Supreme Court, U.S.
FILED
FEB 3 1992
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No. ___

IN THE

Supreme Court of the United States

October Term, 1991

Connecticut Bank and Trust Company,
National Association, *et al.*,

Petitioners,

v.

Wilmington Trust Company,
and
United States District Court for the District of Hawaii, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can a plaintiff's right to have its admiralty actions tried to the bench, pursuant to Rule 9(h) and 38(e), Fed R. Civ. P., be nullified by a permissive intervenor who joins non-admiralty claims and demands a jury trial pursuant to Rule 38(a), Fed. R. Civ. P., and the "saving to suitors" clause of 28 U.S.C. § 1333(1) (1988).

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

The Parties in this Court are as follows:

Petitioners: Connecticut Bank and Trust Company, National Association,[1] and Wartsila Marine Industries Inc.[2]

Respondents: Wilmington Trust Company and International Organization of Masters, Mates & Pilots[3] and the United States District Court for the District of Hawaii.

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[1] Following the initiation of this action, the corporate trust department of Connecticut Bank and Trust Company, National Association, was acquired by State Street Bank and Trust Company of Connecticut, N.A. and its name was changed accordingly. State Street Bank and Trust Company of Connecticut, N.A. is wholly owned by State Street Bank and Trust Company, which is, in turn, wholly owned by State Street Boston Corporation.

[2] At the initiation of this action, Wartsila Marine Industries Inc., a Finnish corporation, was owned by two Finnish corporations, Oy Wartsila Ab (70%) and Valmet Corporation (30%). In August, 1989, Oy Wartsila Ab transferred 51% of its ownership to Union Bank of Finland and its corporate affiliate, Pomi Trading Oy, and the Government of Finland acquired majority control of the Board of Directors of Wartsila Marine Industries Inc. On October 23, 1989, Wartsila Marine Industries Inc. filed for bankruptcy in the City Court of Helsinki, Finland and is in the process of being liquidated pursuant to Finnish bankruptcy law.

[3] This proceeding was instituted by Connecticut Bank and Trust Company, National Association as an admiralty *in rem* proceeding against the U.S.-flag vessel "MONTEREY" and an *in personam* proceeding against its owner, the S.S. Monterey Limited Partnership, for a deficiency judgment. Respondents as well as the following other parties intervened as claimants/plaintiffs against the original defendants: VSE Corporation, Theodavies Marine Agencies, Inc., Bethlehem Steel Corporation, Cosmetic Consultants of Hawaii, Lihue Plantation Company, Limited (d.b.a. Kauai Sugar Storage Company), Pacifico Creative Service, Inc., The Maritime Institute of Technology and Graduate Studies, the International Organization of Masters, Mates & Pilots and John F. Sokolowski, Hawaii Stevedores, Inc.,

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In the court from whose judgment review is sought, Petitioners were the Real Parties in Interest, Respondents were Petitioners and the United States District Court for the District of Hawaii was the Respondent.

H.T. & T. Co., Inc., McCabe Hamilton & Renny Co., Inc., Matson Services, Inc., American Ship Management, Inc., Jas W. Glover, Ltd., Velma L. Sullivan, Martin S. Doten, Leon M. Yarborough, Timothy C. Aspinall, Hans W. Purdom and Andres and Manuela Suguitan.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Connecticut Bank and Trust Company, National Association, *et al.*, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this case on April 12, 1991 and amended on May 7, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Wilmington Trust v. United States District Court for the District of Hawaii*, as amended, is reported at 934 F.2d 1026 (9th Cir. 1991) and is reprinted in the Appendix to this Petition ("App.") p. 1a. The denial by the United States Court of Appeals for the Ninth Circuit of Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc is

reprinted in the Appendix, App. p. 15a. The order of the United States District Court for the District of Hawaii granting the motion of Petitioners to strike Respondents' jury demand is reprinted in the Appendix, App. p. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1991 and amended on May 7, 1991. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 4, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

FEDERAL STATUTES AND RULES INVOLVED

The relevant federal statutory provisions and rules are reprinted in the Appendix. They are: 28 U.S.C. § 1333(1) (1988), App. p. 20a; Federal Rule of Civil Procedure 9(h), App. p. 21a; and Federal Rules of Civil Procedure 38(a) and (e), App. p. 22a.

STATEMENT OF THE CASE

This Petition challenges the decision of a three-judge panel of the United States Court of Appeals for the Ninth Circuit which issued a writ of mandamus to the district court directing that it hold a jury trial of certain non-admiralty claims based on alleged independent jurisdictional grounds joined by a permissive intervenor in an action within the exclusive admiralty jurisdiction of the district court. The Ninth Circuit's decision further held that, if the non-admiralty claims were closely related factually to the plaintiff's underlying admiralty claims, its decision would result in the entire case being tried to the jury. By so holding, the Ninth Circuit has emasculated the well-established right of a plaintiff to have its admiralty action tried to the bench under Rules 9(h) and 38(e), Fed. R. Civ. P.

On May 15, 1989, Petitioner Connecticut Bank and Trust Company, National Association ("Connecticut Bank"), as in-

denture trustee, filed pursuant to Rule 9(h), Fed. R. Civ. P., a complaint in foreclosure of a preferred mortgage against the U.S.-flag vessel "MONTEREY" (the "Vessel") *in rem* and against its owner, the S.S. Monterey Limited Partnership, *in personam* for a deficiency judgment. Exclusive subject matter jurisdiction was predicated in the United States District Court for the District of Hawaii on 46 U.S.C. § 31325(b)(1) and (c) (Supp. 1989) and on 28 U.S.C. § 1333 (1988). Neither the Rule 9(h) designation in the complaint nor the exclusive admiralty jurisdiction over the claims in the complaint is disputed.

Respondent, Wilmington Trust Company ("Wilmington Trust"), as indenture trustee for Respondent International Organization of Masters, Mates & Pilots (the "Union"), intervened as a claimant against the Vessel and filed an answer to Connecticut Bank's complaint pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims. In its answer, Wilmington Trust asserted affirmative defenses and a claim for equitable subordination of Connecticut Bank's first mortgage to Wilmington Trust's second mortgage on the Vessel.

In addition, the Union selected the admiralty action as the forum for non-admiralty claims which it wanted to pursue against Wartsila Marine Industries Inc. ("Wartsila Marine"), one of the beneficiaries of Connecticut Bank's preferred mortgage, and Oy Wartsila Ab, the principal shareholder of Wartsila Marine. The two Wartsila companies were independent Finnish corporations and neither was a named party in the action. The Union styled these non-admiralty claims as "counterclaims" although neither Wilmington Trust nor the Union had been sued *in personam* by Connecticut Bank or the two Wartsila companies. The Union asserted 28 U.S.C. §§ 1331 (federal question) and 1332 (diversity) as the jurisdictional bases for its non-admiralty "counterclaims" and demanded a jury trial pursuant to Rule 38(a), Fed. R. Civ. P., and the "saving to suitors" clause of 28 U.S.C. § 1333(1) in an attempt to nullify Connec-

ticut Bank's Rule 9(h) designation of the action as a non-jury admiralty action.

On July 30, 1990, the district court granted Connecticut Bank's motion to strike the Union's jury trial demand. On September 4, 1990, Respondent Wilmington Trust filed a Petition for Writ of Mandamus in the Ninth Circuit to direct the district court to hold a jury trial of the Union's "counterclaims" and Connecticut Bank's factually related admiralty claims. The Ninth Circuit granted the Petition for Writ of Mandamus by opinion dated April 12, 1991, which was subsequently amended for publication on May 7, 1991. Connecticut Bank timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on April 29, 1991, both of which the Ninth Circuit denied by order dated November 4, 1991.

Following the filing of the Petition for Writ of Mandamus, the district court on May 17, 1991, granted summary judgment against all of the Union's non-admiralty "counterclaims" that were the subject of the Petition, leaving only a common-law fraud claim that the Union had been permitted to join by amendment on September 26, 1990 against the two Wartsila companies, and Wilmington Trust's admiralty claim for equitable subordination of Connecticut Bank's preferred mortgage. Also on May 17, 1991 the district court dismissed Oy Wartsila Ab from the case for lack of personal jurisdiction, which dismissal is currently on appeal to the Ninth Circuit, and upheld the validity of Connecticut Bank's preferred mortgage. Finally, on October 7, 1991, the district court denied the motion filed by Wartsila Marine to dismiss the Union's common-law fraud claim for lack of diversity jurisdiction. The district court recognized that the Union's fraud claim was permissive and that there was no diversity jurisdiction to support it. Nonetheless, the district court exercised its discretion to retain the Union's fraud claim under the doctrine of pendent jurisdiction notwithstanding its dismissal of all of the Union's federal claims.

As directed by the Ninth Circuit, the district court ordered a jury trial of the Union's fraud claim against Wartsila Marine to be held concurrently with the trial of Wilmington Trust's equitable subordination claim against Connecticut Bank's preferred mortgage. The trial is scheduled to commence on July 6, 1992. Consequently, Petitioners respectfully request that this Court give prompt consideration to this Petition. If this Petition is granted before the scheduled trial date, Petitioners will move the district court for a stay of the trial pending review by this Court.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision emasculates Federal Rules of Civil Procedure 9(h) and 38(a), which preserve the well-established right of admiralty plaintiffs to a non-jury trial.

The Ninth Circuit's decision emasculates Rules 9(h) and 38(e), Fed. R. Civ. P., by allowing an intervenor who joins non-admiralty claims with an alleged independent basis of jurisdiction to nullify the plaintiff's well-established right to have its admiralty action tried to the bench. *See, generally*, 9 Wright & Miller, *Federal Practice & Procedure* § 2315, at 76 (1971) ("If plaintiff [chooses to identify its claim as an admiralty claim under Rule 9(h),] there will ordinarily be no jury trial."); 2A J. W. Moore, *Moore's Federal Practice*, ¶ 9.09, at 9-98 (1991) ("A defendant in a case brought within admiralty jurisdiction loses the right he would have in an ordinary civil action at 'law' to demand a jury trial . . . ."). *See also* M. J. Norris, *Maritime Personal Injuries* § 115, at 505 (3d ed. 1981) ("If a plaintiff wishes to try his case before the court he can *preclude* a jury demand from the defendant by invoking admiralty or maritime jurisdiction [through Rule 9(h)]." (emphasis added))

Congress has delegated to the Supreme Court the power to prescribe rules of practice and procedure for the federal courts.

28 U.S.C. § 2072 (1988). Pursuant to this authority, the Chief Justice in 1964 convened the Judicial Conference of the United States which appointed an Advisory Committee for the unification of the Civil and Admiralty Rules. The Advisory Committee was composed of America's most eminent admiralty scholars and practitioners. *See, generally, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the U.S. District Courts*, 34 F.R.D. 325 (1964) and S.B. Bradley, *Admiralty Aspects of the Civil Rules*, 41 F.R.D. 257 (1967).

When Rule 9(h) was enacted in 1966, the Advisory Committee agreed that "[c]ertain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty." Fed. R. Civ. P. 9 advisory committee notes at 42 (West 1991). The Committee specifically disclaimed any intent to change settled admiralty law with respect to the non-jury feature of admiralty. "It is no part of the purpose of unification to inject a right to jury trial into these admiralty cases in which that right is not provided by statute." *Id.* The Committee members unambiguously stated that it was their intent in drafting Rule 9(h) to "provide some device for preserving the present *power* of the pleader to determine whether these historically maritime procedures [including a non-jury trial] shall be applicable to his claim or not . . . ." *Id.*, at 42-43 (emphasis supplied). To this end, Rule 38(e) was promulgated as a companion to Rule 9(h) to guarantee that the unified admiralty and civil rules were not to be construed as creating a jury trial right in admiralty.

Leavenworth Colby, a key member of the Advisory Committee and Chief of the U.S. Justice Department's admiralty section, reported in his commentary on the new rules that Rule 9(h), when read in conjunction with Rule 38(e), "preserves for admiralty and maritime cases the plaintiff's *right* to foreclose a demand by defendant for jury trial." L. Colby, *Admiralty Unification*, 54 Geo. L.J. 1259, 1261 (1966) (emphasis sup-

plied). This right was based upon what Professor Colby termed the "[a]dmiralty freedom from jury trial." *Id.*

The rules proposed by the Advisory Committee, including the no-jury-in-admiralty provisions, were approved by this Court without change,[4] and were presented by the Chief Justice to Congress pursuant to 28 U.S.C. § 2072. After a 90 day "layover" period with Congress, the new rules became effective. "The purpose of this layover period is clearly to permit legislative scrutiny and, where appropriate, legislative veto." *In re Halkin*, 598 F.2d 176, 185 n.17 (D.C. Cir. 1979).

Accordingly, Rules 9(h) and 38(e), which preserved the maritime *status quo* by reaffirming that an admiralty plaintiff had the power to create a non-jury trial, were approved by this Court, scrutinized by Congress, and entered into law in 1966.

The Ninth Circuit completely disregarded the Advisory Committee's published comments and numerous maritime precedents when it boldly stated that a plaintiff's "election to proceed in admiralty via a Rule 9(h) designation does not affect another party's right to a jury." *Wilmington Trust v. United States Dist. Ct.*, 934 F.2d 1026, 1031 (9th Cir. 1991). At the very least, this statement is unnecessarily broad and dangerously worded. It is also a misstatement of the law. It deprives a plaintiff of not only a privilege but a "power" and a "right" to determine the procedural consequences of his admiralty suit, and will "undermine," "emasculate" and "undercut" plaintiff's rights under Rules 9(h) and 38(e). *See Harrison v. Flota Mercante Grancolombiana S.A.*, 577 F. 2d 968, 987 (5th Cir. 1978); *Insurance Co. of N. Am. v. Virgilio*, 574 F. Supp. 48, 51 (C.D.

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[4] *Order of February 28, 1966*, 86 S. Ct. at 173 (1966). Several courts have interpreted this Court's approval of Rules 9(h) and 38(e) as proof that the court "acquiesced to the tradition of not allowing a jury trial if the federal court's jurisdiction is founded upon the admiralty and maritime nature of the suit." *McCann v. Falgout Boat Co*, 44 F.R.D. 34, 43-44 (S.D. Texas 1968); *Cantey v. Flensburger Dampfercompagnie Harald Schuldt & Co.*, 55 F.R.D. 127, 128 (E.D.N.C. 1971).

Cal. 1983); *Zurich Ins. Co. v. Banana Services*, 1985 A.M.C. 1745, 1745 (S.D. Fla. 1984). The Ninth Circuit has effectively written the no-jury-in-admiralty principle set forth in Rules 9(h) and 38(e) out of the Federal Rules of Civil Procedure. Given the breadth of the Ninth Circuit's ruling, it is hard to conceive of any maritime case (which almost inevitably involves diverse, international parties) where it would be possible to maintain plaintiff's non-jury election, since clever lawyers will always be able to concoct common law counterclaims or cross claims to inject in admiralty proceedings for the purpose of defeating a plaintiff's Rule 9(h) designation.

The Federal Rules are not mere procedural guidelines. They are to be given the same force and effect as other statutes. *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 50 n.19 (D.D.C. 1984) (citing 28 U.S.C. § 2072, and *United States ex rel. Tanos v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966)). Therefore, federal rules such as 9(h) and 38(e) should not be construed in such a manner as to render them ineffective. A cardinal principle of statutory construction is to accord each clause and word due effect. *United States v. Menasche*, 348 U.S. 528, 539 (1955). No part of a statute or rule should be interpreted in such a way as to make it superfluous, or mere surplusage. *Pacific Mut. Ins. Co. v. American Guar. Life Ins.*, 722 F.2d 1498, 1500 (9th Cir. 1984). And when interpreting the federal rules, the Advisory Committee's construction is to be given particular deference. *See Mississippi Publishing Corp. V. Murphree*, 326 U.S. 438, 444 (1946). However, in *Wilmington Trust*, the Ninth Circuit has ignored all of these accepted rules of construction.

The holding in *Wilmington Trust* has extremely adverse practical consequences for admiralty practitioners, as well as for the efficiency of the federal courts. If a maritime plaintiff's Rule 9(h) election is so easily defeated, then nearly *every* maritime

case will be heard by a jury. District courts (particularly in busy port cities like Los Angeles, San Francisco, Seattle and New Orleans) will be confronted with a greater number of costly and time-consuming jury trials.

As the Fifth Circuit (which is known for its particular admiralty expertise) recognized in *Merchants National Bank of Mobil v. The Dredge General G.L. Gillespie*, 663 F.2d 1338, 1346-51 (5th Cir. 1980), *cert. denied*, 456 U.S. 966 (1982), admiralty is unique. It pre-existed even the earliest English common law, and involves a complicated intermeshing of international law, centuries old practices and procedures, and the presumption that judges, rather than juries, are the best fact-finders of complicated salvage, limitation of liability, collision, maritime lien and general average cases. *See, e.g., McCann v. Falgout Boat Co.*, 44 F.R.D. 34, 43 (S.D. Tex. 1968) (citing 2 S. F. Friedell *et al.*, *Benedict on Admiralty* § 224 (1940)).

In *Merchants*, the Fifth Circuit refused to strike down the traditional admiralty remedies of arrest and pre-trial attachment, despite defendants' arguments that such procedures were old-fashioned and violated modern rules of due process. The court emphasized that the admiralty procedures at issue had "roots deep in the maritime history of the nation," and have been a "distinguishing feature" of the admiralty jurisdiction for centuries. *Merchants*, 663 F.2d at 1342 & n.8. Accordingly, the court would not "take lightly" their importance to the law of admiralty, and ruled that "the Constitution is sufficiently flexible to permit its requirements to be considered in relation to the legal and commercial contexts in which they are invoked." *Id.*, at 1343. In essence, the court found that where certain inherently admiralty procedures have existed since the Constitution was enacted, the courts should be very cautious about destroying or emasculating them.

The Ninth Circuit's decision, on the other hand, ignores long-standing admiralty rights and traditions. The Ninth Circuit

justified its rejection of maritime law upon, in part, the Seventh Amendment's preservation of jury trial rights for common law claimants. *Wilmington Trust*, 934 F.2d at 1029. However, the Seventh Amendment only applies to "suits at common law" and the Ninth Circuit ignored the fact that this Court has specifically held that the Seventh Amendment does not require jury trials in admiralty cases. *Fitzgerald v. U.S. Lines*, 374 U.S. 16, 20 (1963). *See also* Chief Justice Marshall's opinion in *The Sarah*, 21 U.S. 391, 394 (1823) ("In cases of admiralty and maritime jurisdiction, it has been settled...that the trial is to be by the court.")

The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (currently codified at 28 U.S.C. § 1331) specially excepted cases brought under the admiralty jurisdiction from the Seventh Amendment's right to a jury trial. Furthermore, this Court has ruled that admiralty cases are not cases at common law, within the meaning of the Seventh Amendment. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 459-60 (1847).

There is no dispute that the case below was within the district court's exclusive admiralty jurisdiction. No purer maritime action exists than the *in rem* enforcement of a preferred ship mortgage or maritime lien. Accordingly, the Seventh Amendment may not be used by Respondents to bootstrap common law jury rights into an action which, at base, arises out of the court's admiralty jurisdiction.

2. The Ninth Circuit's decision conflicts with prior Ninth Circuit precedent and is based on a misinterpretation of this Court's precedent.

In *McCrary v. Sea Train Lines, Inc.*, 469 F.2d 666, 668 (9th Cir. 1972), the Ninth Circuit unequivocally declared:

> A shipowner has the right, if exercised by timely designation, to assert through Rule 9(h) recourse to

> traditional admiralty practice and thus to obviate the jury trial on the third party claim.

The *McCrary* court noted that the admiralty claim was ancillary to the third party claimant's diversity action. Nonetheless, the shipowner was entitled to have *all* of the issues in the case tried before the court alone.

Twelve years later, *McCrary* was approvingly cited by the Ninth Circuit court in *Emerson G.M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468, 1471-72 (9th Cir. 1984). The *Emerson* court followed *McCrary*, and ruled that a third party defendant had no right to a jury trial where the original plaintiff had properly elected to identify his claim as maritime under Rule 9(h).

Bound by the holdings in *Emerson* and *McCrary*, district courts within the Ninth Circuit have regularly ruled that plaintiff's timely recourse to Rule 9(h) precludes a defendant, cross-claimant, or cross-defendant from having a jury trial. *See, e.g., Reliance Ins. Co. v. McGrath*, 671 F. Supp. 669, 674 (N.D. Cal. 1987); *Insurance Co. of N. Am. v. Virgilio*, 574 F. Supp. 48, 50-51 (C.D. Cal. 1983); *Underwriters at Lloyds v. May*, 1983 A.M.C. 2447 (S.D. Cal. 1983); *Elverfeld v. Central Gulf S.S. Co.*, 1974 A.M.C. 409 (N.D. Cal. 1973); and *Alaska Barite Co. v. Freighters Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972).

The Ninth Circuit, however, ignored its own recent rulings holding that plaintiff's Rule 9(h) election precludes defendants or intervenors from asserting a right to a jury trial. The Ninth Circuit grounded its holding in *Wilmington Trust* on its belief that this Court allowed in an admiralty action a seaman's admiralty claims for unseaworthiness and maintenance and cure to be tried before a jury together with his statutory Jones Act claim in *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963). However, the Ninth Circuit misinterpreted *Fitzgerald* by failing to distinguish between admiralty claims in actions at law and admiralty actions, and by construing *Fitzgerald* as an admiralty

action. *Fitzgerald* was not an admiralty action, but rather an action at law, which included admiralty claims that were brought on the civil side of the court prior to the merger of the civil and admiralty rules. The Jones Act specifically provides that a seaman can bring his negligence claims "at law, with the right of trial by jury." 46 U.S.C. App. § 688 (1988). However, this statutory provision only applies in actions at law. This Court established long before *Fitzgerald* that a seaman who brought his claim in an admiralty action would not have any right to a jury trial. *See Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391 (1924). Thus, *Fitzgerald*, cannot be constured to permit jury trials in admiralty actions. This Court has never held that admiralty actions can be tried to a jury in the absence of a statute that specifically provides for a jury trial.

The holding in *Fitzgerald* is much narrower than the Ninth Circuit believed,[5] and represented this Court's administrative response to an historical accident – the intertwining of three essentially similar causes of action arising out of the same operative facts. The three claims in *Fitzgerald* were "essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." *Id.* at 21. Since Congress had specifically granted a jury trial right to seamen in actions at law under the Jones Act, it made sense to have all three closely interrelated matters heard before the same trier of fact. The result was particularly appropriate since seamen are traditionally seen as the "children of admiralty" and "wards of the court," and are treated with extreme solicitude by the federal bench. *See, e.g., California Home Brands v. Ferreira*, 871 F.2d 830, 837-38 (9th Cir. 1989).

All of the cases cited as authoritative by the Ninth Circuit were seamen's personal injury actions, and are therefore not

[5] The actual holding in *Fitzgerald* was very narrowly drawn. "[W]e hold that a maintenance and cure claim joined with a Jones Act claim must be submitted to a jury when both arise out of one set of facts." 374 U.S. at 21.

controlling authority for the Ninth Circuit's sweeping decision that a third-party intervenor with an arguably related claim with an alleged independent basis of jurisdiction will, under the "savings to suitors" clause of 28 U.S.C. § 1333(1), always be able to defeat a maritime plaintiff's right to elect a non-jury proceeding by means of a Rule 9(h) designation.

Furthermore, the *Fitzgerald* case must be viewed in context. This Court traditionally conforms its own judge-made maritime remedies for seamen to those which have been promulgated by Congress. Whenever the national legislature has already spoken on a specific subject, this Court will not use its own interpretation of the general maritime law to expand or contract the remedies or procedures provided by statute. *See, e.g., Miles v. Apex Marine Corp.*, ____ U.S. ____, 111 S. Ct. 317, 319 (1990) (refusal to extend a seaman's rights to compensation under the federal maritime law since Congress had explicitly limited a seaman's compensation remedies under the Jones Act). Seen in this context, the *Fitzgerald* court was merely deferring to Congress' statutory directive. Since the Jones Act explicitly granted jury trials for seamen's negligence claims, the court exercised its power to have unseaworthiness and maintenance and cure claims arising out of the same facts tried by the same jury.

In *Wilmington Trust*, however, no such Congressional directive exists. Congress has never granted *in rem* claimants, or any parties, other than seamen, a statutory right to a jury trial. To the contrary, by accepting Rules 9(h) and 38(e), Congress implicitly gave its imprimatur to the long established no-jury-in-admiralty principle.

The Ninth Circuit's reliance on this Court's decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) is also misplaced because those cases involved a "race to the courthouse," where the plaintiff sought to deny the defendant the right

to a jury trial on its claim at law by suing first in equity. This Court held in *Beacon Theatres* that the defendant's antitrust claim at law must be tried first to a jury before the plaintiff's claim in equity for declaratory relief.

This action, however, did not involve a "race to the courthouse." Connecticut Bank brought an *in rem* admiralty action against the Vessel and its owner, in which Respondents later intervened and chose to insert *in personam* claims against additional parties. As the district court reasoned in *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972):

> Here, there are actually two separate areas of dispute unlike *Beacon Theatres*. Plaintiff has alleged a breach of contract while defendant has made a counterclaim alleging a violation of antitrust laws. The admiralty contract claim was brought first. To allow defendant to defeat plaintiff's right to a non-jury trial under Rules 9(h) and 38(e) would create an easy method for all defendants in admiralty to get out from under the retained admiralty practices. This Court does not believe that the rights invoked by making an election under Rule 9(h) were meant to be negated whenever a defendant makes a counterclaim outside of admiralty. The plaintiff has properly made an election to use Rule 9(h) and therefore he has the right to a non-jury trial.

Id., at 195.

3. The Ninth Circuit's decision conflicts with decisions of other circuits.

The Ninth Circuit, in *Wilmington Trust*, flatly stated that "a Rule 9(h) designation does not affect another party's right to a jury." *Wilmington Trust*, 934 F.2d at 1030-31. In *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987 (5th Cir. 1987), the Fifth Circuit reached an absolutely contrary

conclusion. The Fifth Circuit "closely scrutinized" the tension between Rule 9(h) and the common law right to trial by jury. It carefully reviewed the legislative history of Rule 9(h) and the Advisory Committee's interpretation that the unification of the civil and admiralty rules would not infringe upon "the present power of the pleader to determine whether these historic maritime procedures [including a non-jury trial] shall be applicable to his claim or not . . . ." *Id.*, at 986-87. The Fifth Circuit denied cross-defendants' request for a jury (although an independent basis for jurisdiction existed) on the grounds, *inter alia*, that it would be an excess of judicial power "to permit a third party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the single expedient of bringing in a fourth party defendant." *Id.*, at 987.

Numerous panels of the Fifth Circuit, and lower courts within the Fifth Circuit, have similarly ruled that once a Rule 9(h) election is made by plaintiff, the existence of diverse citizenship or a federal question as an alternate basis of jurisdiction does not entitle *any* other party to a jury trial. *See, e.g., TNT Marine Service Inc.*, 702 F.2d 585, 587 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983); *Fisher v. Danos*, 671 F.2d 904, 906 (5th Cir. 1982), *cert. denied*, 452 U.S. 840 (1982); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1253-54 (5th Cir. 1975); *Hails v. Atlantic Richfield Co.*, 595 F. Supp. 948, 951-52 (W.D. La. 1984); *Arkwright Boston Mfrs. Mut. Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D. Texas 1977).

The Ninth Circuit's decision also conflicts with decisions of other courts in other circuits. In *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041 (8th Cir. 1983), the Eighth Circuit acknowledged that once a plaintiff designates his claim as a 9(h) claim in admiralty, such an election ordinarily precludes a jury trial. The court acknowledged that jury trials are not expressly prohibited in admiralty, but affirmed the lower court's decision to honor plaintiff's election to have its admiralty

claims tried by the court alone. *See, also, Royal Ins. Co. of America v. Hansen*, 125 F.R.D. 5, 6-9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint*, 90 F.R.D. 313, 317 (E.D.N.Y. 1981); *Cantey v. Flensburger Dampfercompagnie Harald Schuldt & Co.*, 55 F.R.D. 127, 128 (E.D.N.C. 1971).

The Ninth Circuit's holding in *Wilmington Trust* squarely conflicts with the carefully reasoned holdings of other circuit court panels, as well as with numerous district court decisions. It is important for this Court to establish a uniform rule among the circuits that a plaintiff has the right to preserve the non-jury feature of admiralty jurisdiction by means of a Rule 9(h) designation.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of *certiorari* should issue to review the decision of the Ninth Circuit in this case. Petitioners respectfully request that this writ be issued before the July 6, 1992 jury trial ordered by the district court. If the writ is issued before the scheduled trial date, then Petitioners will request that the district court stay the trial pending review by this Court.

Respectfully submitted

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APPENDIX A

WILMINGTON TRUST and International Organization of Masters, Mates & Pilots, Petitioners,

v.

The UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, Respondent,

and

Connecticut Bank and Trust Company, National Association Wartsila Marine Industries, Inc. and Oy Wartsila Ab, Real Parties in Interest;

VSE Corporation; Theodavis Marine Agencies, Inc.; Pacifico Creative Service, Inc.; the Maritime Institute of Technology and Graduate Studies; International Organization of Masters, Mates & Pilots and John F. Sokolowski; Hawaii Stevedores, Inc.; H.T. & T. Co., Inc.; McCabe Hamilton & Renny Co., Inc.; Matson Services, Inc.; American Ship Management, Inc.; Jas W. Glover, Ltd.; Cosmetic Consultants of Hawaii; Andres Suguitan; Manuela Suguitan; Leon Marvin Yarborough; Timothy C. Aspinall; Martin S. Doten; Velma M. Sullivan; Bethlehem Steel Corporation; and the Lihue Plantation Company, Limited dba Kauai Sugar Storage Company, Other Parties.

No. 90-70433

United States Court of Appeals, Ninth Circuit

Argued and Submitted Jan. 18, 1991.
Decided April 12, 1991.
Amended May 7, 1991.

[*1027] Action was brought to foreclose on first preferred ship mortgage. Holder of second preferred ship mortgage answered plaintiff's complaint, filed counterclaims, and demanded a jury trial on the counterclaims. The United States Distrcit Court for the District of Hawaii, Samuel P. King, J., entered order striking second mortgage holder's jury trial demand, and second mortgage holder petitioned for writ of mandamus. The Court of Appeals, Shubb, District Judge, sitting by designation, held that plaintiff's election to proceed in admiralty did not affect defendant's right to jury trial.

Writ issued.

John F. Keating, Hill, Betts & Nash, New York City, for petitioners.

Michael Evan Jaffe, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., for real parties in interest.

Petition for Writ of Mandamus to the United States District Court for the District of Hawaii.

Before TANG and NOONAN, Circuit Judges, and SHUBB,* District Judge.

SHUBB, District Judge:

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* Honorable William B. Shubb, United States District Judge for the Eastern District of California, sitting by designation.

I
PROCEDURAL AND FACTUAL BACKGROUND

Petitioners Wilmington Trust, as trustee for the International Organization of Masters, Mates and Pilots ("Union"), and the Union request this court to issue a writ of mandamus directing United States District Judge Samuel P. King to try the Union's claims before a jury. The court has jurisdiction to consider and issue the writ pursuant to 28 U.S.C. § 1651(a).[1]

The underlying action was initiated by Respondent Connecticut Bank & Trust Company ("Connecticut Bank"), solely as indenture trustee for Wartsila Marine Industries, Inc. ("Wartsila") a Finnish corporation. The complaint consists of an *in rem* claim to foreclose a First Preferred Ship Mortgage against the SS Monterey ("vessel"), and a related *in personam* claim against the owner of the vessel, the SS Monterey Limited Partnership ("Partnership").[2] The complaint also includes the assertion that "Plaintiff's claim is an admiralty and Maritime Claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and the Ship Mortgage Act of 1920, 46 U.S.C. § 911 *et seq.*"[3]

The Union, though not a named defendant, answered the complaint and filed an *in rem* claim against the vessel to foreclose a Second Preferred Ship Mortgage and several other claims designated as "counterclaims" ("Counterclaims") against Wartsila. The Union demanded a jury trial. Those

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[1] Section 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[2] The parties concede that the claim against the Partnership is no longer part of the underlying action.

[3] The Ship Mortgage Act of 1920 was repealed effective January 1, 1989. Act of Nov. 23, 1988, Pub.L. 100-710, Title I, § 106(b)(2), 102 Stat. 4752.

Counterclaims include both legal and equitable claims. Independent jurisdictional [*1028] grounds are alleged for each claim and their joinder is not contested.

Wartsila's foreclosure action, and the Union's Counterclaims and foreclosure action, are factually interrelated and arise out of the following transactions. The Union exchanged its ownership interest in the vessel to the Partnership for a second preferred ship mortgage, an interest in the Partnership, and an agreement that the vessel would be staffed exclusively with Union members. One of the purposes of the exchange was to generate capital to refurbish the vessel. The Partnership contracted with Wartsila to refurbish the vessel and Wartsila extended credit to the Partnership in exchange for the first preferred ship mortgage.

The district court ordered the interlocutory sale of the vessel. Wartsila's indenture trustee, Connecticut Bank, is the named purchaser of the ship on behalf of Wartsila. According to undocumented assertions of counsel, Wartsila is involved in bankruptcy proceedings in Finland, and the Finnish Guaranty Board ("FGB"), a "foreign state" within the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, extended a letter of credit to Connecticut Bank on behalf of Wartsila enabling the bank to purchase the vessel at the interlocutory sale.

On July 30, 1990, the district court entered an order striking the Union's timely jury demand for the "reasons set forth in the memoranda of the Plaintiff Connecticut Bank." Connecticut Bank had urged the district court to strike the Union's jury demand on two grounds: first, Wartsila's 9(h) election to proceed within the court's admiralty jurisdiction extinguished any right to a jury trial that the Union may have had; second, Wartsila has a right to a non-jury trial pursuant to the Foreign Sovereign Immunities Act. For the reasons discussed below, we order the writ to issue.

II
STANDARD OF REVIEW

Mandamus is an extraordinary remedy "which is awarded, not as a matter of right, but in the exercise of sound judicial discretion." *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-12, 38 S.Ct. 99, 100-01, 62 L.Ed. 309 (1917). Generally, a writ should issue only if the petitioner meets "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953). The right to a jury trial, however, has occupied an exceptional place in the history of the law of federal mandamus permitting a writ to issue although the petitioner is unable to show a "clear and indisputable" right. *See In re Simons*, 247 U.S. 231, 239-240, 38 S.Ct. 497, 497-98, 62 L.Ed. 1094 (1918). *See also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 3 L.Ed.2d 988 (1959) ("Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled.").

This Court recognizes that a party may seek relief in the form of mandamus to protect the party's right to a jury trial. *See Mondor v. United States Dist. Court*, 910 F.2d 585, 586-87 (9th Cir. 1990); *Owens-Illinois, Inc. v. United Dist. Court*, 698 F.2d 967, 969 (9th Cir. 1983). The only question before us is "whether the district court erred in denying petitioner's request for a jury trial." *Mondor*, 910 F.2d at 586.

III
WARTSILA'S RULE 9(h) DESIGNATION DID NOT EXTINGUISH THE UNION'S RIGHT TO JURY TRIAL

The basis for admiralty jurisdiction is set forth in 28 U.S.C. § 1333, which states:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all [*1029] cases all other remedies to which they are otherwise entitled.

The "saving-to-suitors" clause establishes the right of a party to choose whether to proceed within the court's admiralty jurisdiction or general civil jurisdiction when both admiralty and non-admiralty federal jurisdiction exist. *See, e.g., Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 359-60, 82 S.Ct. 780, 783-84, 7 L.Ed.2d 798 (1962).

Prior to the 1966 merger of law and admiralty, a plaintiff exercised this option by filing a claim on the admiralty side or the civil side of the federal court. *Id.* With the merger of law and admiralty, the Federal Rules of Civil Procedure advisory committee recognized the need for a mechanism to inform the court of a claimant's election to proceed in admiralty on claims cognizable both in admiralty and the court's general civil jurisdiction. Consequently, the committee noted:

> Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions.
>
> * * * * * *
>
> One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.
>
> * * * * * *

> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. . . . The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty where its character as such is not clear.

Fed.R.Civ.P. 9(h) advisory committee's notes to 1966 amendment.

Rule 9(h) provides the modern-day mechanism for invoking admiralty jurisdiction of claims that could also be brought within the court's general civil jurisdiction. Rule 9(h) provides in part:

> A pleading or count setting forth a-claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claims as an admiralty or maritime claim for the purposes of Rule 14(c), 38(e), 83 and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not.

A pleader may thus designate a claim as an "admiralty or maritime claim within the meaning of Rule 9(h)" to inform the court that the pleader has elected to proceed within the court's admiralty jurisdiction.

Although the Supreme Court has held that the Constitution does not require trial by jury in admiralty cases, it neither forbids trial by jury nor creates a right to a non-jury trial. *See Fitzgerald*

v. United States Lines Co., 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720 (1963); *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956 ("no . . . [constitutional] requirement protects trials by the court"). This general rule survived the merger; Rule 9(h) neither creates a right to a non-jury trial, nor compromises a party's right to a jury trial. *See* Fed.R.Civ.P. 9(h) advisory committee's notes to 1966 amendment. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Fed.R.Civ.P. 38(a).

Wartsila argues that its Rule 9(h) designation attaches to all the claims in the [*1030] case[4] and urges the court to adopt the reasoning of *Insurance Co. of North America v. Virgilio*, 574 F.Supp. 48, 50-51 (S.D.Cal. 1983) (holding that plaintiff's Rule 9(h) designation in an action for declaratory relief deprived defendant of a jury trial of defendant's legal counterclaims); *see also Harrison v. Flota Mercante Grancolombiana S.A.*, 577 F.2d 968, 987 (5th Cir. 1978) (holding that plaintiff's Rule 9(h) election prohibited jury trial of legal claims in third party complaint because "we refuse to permit a third-party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the simple expedient of bringing in a fourth-party defendant"); *Royal Ins. Co. v. Hansen*, 125 F.R.D. 5, 8-9 (D.Mass. 1988) (defendant not entitled to jury trial of counterclaims in face of plaintiff's 9(h) designation); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D.Tex. 1977) (same).

In *Virgilio*, plaintiff insurance company filed an action against its insured requesting a declaration that the insurance contract would not cover any claim the insured might bring as

[4] Because Wartsila's foreclosure action is a claim that can be brought only within the court's admiralty jurisdiction, a 9(h) designation was not necessary to apprise the district court that Wartsila had elected to proceed in admiralty. *See Emerson G.M. Diesel Inc. v. Alaskan Enter.*, 732 F.2d 1468, 1470 n. 1 (9th Cir. 1984) (ship lien foreclosure action cognizable exclusively in admiralty); Fed.R.Civ.P. 9(h).

a result of a boating accident. *Virgilio*, 574 F.Supp. at 49. Plaintiff designated its claim as a claim in admiralty pursuant to Fed.R.Civ.P. 9(h). *Id.* The defendant counterclaimed for breach of contract, breach of fiduciary duty, breach of the covenant of fair dealing and demanded a jury trial. *Id.* The court struck defendant's jury demand and distinguished *Fitzgerald*, 374 U.S. 16, 83 S.Ct. at 1646, *Blake v. Farrell Lines*, 417 F.2d 264 (3rd Cir. 1969), and *Owens-Illinois*, 698 F.2d 967, because these cases did not involve "a plaintiff electing to proceed in admiralty under 9(h)." *Virgilio*, 574 F. Supp. at 51. The court also denied defendant's request to try his claims to a jury separately from plaintiff's claims. The court reasoned that to do so "would undercut the plaintiff's election under Rule 9(h)." *Id.* We reject the reasoning of *Virgilio*.[5]

Prior to the merger of law and admiralty, the Supreme Court recognized the right to a jury trial in admiralty notwithstanding the customary non-jury component of admiralty practice. *Fitzgerald*, 374 U.S. at 21, 83 S.Ct. at 1650. In *Fitzgerald*, plaintiff filed a complaint on the admiralty side of the court containing two claims; one claim was cognizable solely in admiralty, the other claim was triable to a jury under the Jones Act, 46 U.S.C.App. § 688. *Fitzgerald*, 374 U.S. at 17,

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[5] The result in *Virgilio* has been criticized for encouraging a race to the courthouse:

> If the admiralty plaintiff wins, both claims will be tried to the bench. If the counterclaim claimant wins, his claim will be tried to a jury . . . . [T]his result flies in the fact of the Supreme Court's decision in *Beacon Theatres, Inc. v. Westover*. In that case, the Court held: "[I]f [the defendant] would have been entitled to a jury trial . . . against [the plaintiff] it cannot be deprived of that right merely because [the plaintiff] took advantage of the availability of declaratory relief to sue [the defendant] first." [*Beacon Theatres*, 359 U.S. at 504, 79 S.Ct. at 953.]
>
> Note, *The Jury on the Quarterdeck: The Effect of Pleading Admiralty Jurisdiction when a Proceeding Turns Hybrid*, 63 Tex.L.Rev. 533, 562-63 (1984) (citing G. Gilmore & C. Black, *The Law of Admiralty* § 13, at 37 (2d ed. 1975)).

83 S.Ct. at 1648. The Supreme Court held that the plaintiff had a right to have all claims tried to a jury on the admiralty side of the court. *Id.* at 21, 83 S.Ct. at 1650; *see also Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371, 371-72 (9th Cir. 1969) (right to jury trial as to Jones Act claim and to exclusive admiralty claim based on common facts); *Blake*, 417 F.2d at 266-67 (district court may require jury trial in case where legal claim is joined with exclusively maritime claim); and *Zrncevich v. Blue Haw. Enter.*, 738 F.Supp. 350, 354 (D.Haw. 1990) (Jones Act claim and non-jury admiralty claim tried to a jury in admiralty).

Since the election of the plaintiff in *Fitzgerald* to file a claim in admiralty did not deprive even the plaintiff of the right to a jury trial prior to 1966, then a plaintiff's [*1031] post-merger election to proceed in admiralty via a Rule 9(h) designation does not affect another party's right to a jury.[6] *Cf. Emerson G.M. Diesel Inc. v. Alaskan Enter.*, 732 F.2d 1468, 1471 (9th Cir.1984) (defendant in admiralty may designate third party claims in admiralty). Therefore, a defendant may also proceed within the court's general civil jurisdiction under the saving-to-suitors clause.

Regardless of whether a claim is cognizable in admiralty, the right to a jury trial on such claim is preserved despite plaintiff's election to proceed in admiralty. This court has acknowledged that the non-jury component of admiralty jurisdiction must give way to the seventh amendment. In *Owens-Illinois*, the court stated that:

> Where plaintiff alleges both admiralty and diversity as bases for federal jurisdiction, pursuant to Fed.R.Civ.P. 9(h) he has the right to elect to have his

[6] The court in *Virgilio* mistakenly refused to consider *Fitzgerald* for the reason that it did not involve a 9(h) election. A 9(h) designation does nothing more than inform the court of the claimant's election to proceed in admiralty. A 9(h) designation today is equivalent to the earlier practice of filing a claim on the admiralty side of the court prior to the merger. The merger of law and admiralty does not diminish the authority of *Fitzgerald*.

> admiralty claim adjudicated under admiralty procedures, including a bench trial, by identifying his claim as lying in admiralty. *As long as no conflict exists with a defendant's constitutional right to trial by jury, this election if properly made cannot be defeated by defendant's jury trial demand.*[7]

Owens-Illinois, 698 F.2d at 972 n. 2 (emphasis added) (citing *Harrison*, 577 F.2d at 986-87). The United States Supreme Court has held that the right to a jury trial as provided by the seventh amendment overcomes another party's preference for a bench trial when those interests conflict. *See Beacon Theatres*, 359 U.S. at 519-511, 79 S.Ct. at 956-57.

In *Beacon Theatres*, plaintiff brought suit for declaratory relief under the Sherman Antitrust Act ("Act") and defendant filed a counterclaim seeking treble damages under the Act. *Id.* at 502-03, 79 S.Ct. at 952. Defendant demanded a jury trial pursuant to Fed.R.Civ.P. 38(b). The district court directed that the equitable issues be tried before the legal issues thereby "limit[ing] the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit.'" *Id.* at 504, 79 S.Ct. at 953 (quoting *Beacon Theatres, Inc. v. Westover*, 254 F.2d 864, 874 (9th Cir.), *cert. granted*, 356 U.S. 956, 78 S.Ct. 996, 2 L.Ed.2d 1064 (1958), *rev'd*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959)).

> [T]he holding of the court below while granting . . . [plaintiff] no additional protection unless the avoidance of jury trial be considered as such, would compel . . . [defendant] to split his antitrust case, trying part to a judge and part to a jury. Such a result, which involves the postponement and subordination

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[7] Any suggestion in *Owens-Illinois* that a plaintiff has the right to a nonjury trial except when defendant has a constitutional right to a jury trial is dictum. That court did not consider the conflict between a plaintiff's Rule 9(h) designation and a defendant's right to proceed under the saving-to-suitors clause on defendant's counterclaims.

> of . . . [plaintiff's] own legal claim for declaratory relief as well as of the counterclaim which . . . [defendant] was compelled by the Federal Rules to bring, is not permissible.

Beacon Theatres, 359 U.S. at 508, 79 S.Ct. at 955 (footnote omitted).

The Court further observed that the liberal joinder rules permit "legal and equitable causes to be brought and resolved in one civil action" and preserve any statutory or constitutional right to a jury trial. *Id.* at 509, 79 S.Ct. at 956. The Court concluded that the "right to a jury trial of legal issues [cannot] be lost through prior determination of equitable claims." *Id.* at 511, 79 S.Ct. at 957; *see also Dairy Queen*, 369 U.S. at 372-73, 82 S.Ct. at 987 (both legal and equitable issues must be tried to the jury even if legal issues "incidental" to the equitable issues). The same concerns expressed by the Court in *Beacon Theatres* exist when parties join admiralty claims [*1032] with claims to which a right to a jury trial attaches. The same conclusion is therefore warranted; Rule 38(a) of the Federal Rules of Civil Procedure provides that the right to a jury, whether statutory or constitutional, "shall be preserved inviolate."

If the Union's claims are cognizable in admiralty, then the Union's right to a jury trial is preserved by the saving-to-suitors clause, 28 U.S.C. § 1333(1), and Fed.R.Civ.P. 38(a). We find that the Union has properly exercised its option under the saving-to-suitors clause: the Union's counterclaims include claims which carry the right to a jury trial and the Union has alleged independent bases of federal jurisdiction. If the Union's claims are not cognizable in admiralty, then the Union's right to demand a jury trial as provided by the constitution and Fed.R.Civ.P. 38(a) is preserved inviolate and the Union need not have alleged independent bases of jurisdiction.[8]

---

[8] The court therefore finds it unnecessary to determine whether the Union Counterclaims are cognizable in admiralty. *See, e.g., Executive Jet*

Therefore, we hold that Wartsila's election to proceed in admiralty does not deprive the Union of a jury trial on the Union's properly joined claims. We note that our holding may result in the entire case being tried before a jury. This result is likely to occur if all the claims are closely related factually. *See, e.g., Fitzgerald*, 374 U.S. at 21, 83 S.Ct. at 1650 (all claims must be submitted to jury when they "arise out of one set of facts"). If the claims are not related factually, then the district court may order separate trials in order to preserve the non-jury aspect of admiralty jurisdiction. *See, e.g., Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8th Cir. 1983) (district court ordered a jury trial on defendant's counterclaim and tried admiralty claims separately; affirmed by court of appeals in absence of prejudice to defendant's right to jury trial).

IV
WARTSILA DOES NOT HAVE A RIGHT TO NONJURY TRIAL UNDER THE FOREIGN SOVEREIGN IMMUNITY ACT

The purpose and effect of the Foreign Sovereign Immunities Act ("FSIA") (codified at 28 U.S.C. §§ 1602-11) is to identify how and when a plaintiff in a civil action may assert claims against a foreign state. H.R. No. 1487, 94th Cong., 2d Sess. 6, *reprinted* in 1976 U.S.Code Cong. & Admin.News 6604, 6604. No right to a jury trial attaches to claims brought against a foreign state. *See, e.g., Rex v. Cia, Pervana de Vapores, S.A.*, 660 F.2d 61, 63 (3rd Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982). The term "Foreign State," as defined under the FSIA, "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).

Wartsila argues that the Union's claims are claims against a foreign state to the extent of the $14 million letter of credit posted by the FGB. Wartsila does not contend that it is immune

Aviation Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

under the FSIA, only that the Union has no right to a jury trial pursuant to it.[9] However, respondents are without standing to invoke the FSIA.

Congress intended the FSIA to supplant the earlier practice whereby a foreign sovereign would appeal to the State [*1033] Department "to make a formal suggestion of immunity to the court." H.R. No. 1487, 94th Cong., 2nd Sess. 7, *reprinted in* 1976 U.S.Code Cong. & Admin. News 6604, 6606. Congress transferred this decision to the courts. *Id.* We hold that, based on the language of the statute and its legislative history, Congress intended requests for protection under the FSIA to originate from the foreign state party.

Neither Finland nor the FGB is a party in the action. Neither entity has sought to intervene, and neither entity has requested that the FSIA be applied. Neither Wartsila nor the Connecticut bank is a foreign state and counsel for respondents have not suggested that they represent the FGB. Therefore, respondents do not have standing to invoke the FSIA. The court observes that if the FGB were to intervene at this stage of the litigation, it is unlikely such intervention would be timely under Fed.R.Civ.P. 24.

The writ shall issue.

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[9] There is no proof before the court that the FGB is an agency or instrumentality of Finland or that Connecticut Bank purchased the vessel in reliance on a $14 million letter of credit. The FSIA places the burden of proof on the entity attempting to place itself within the act:

> [W]here . . . the plaintiff alleges in his complaint that his claim is based on a foreign state's strictly commercial acts, the defendant must establish a prima facie case that it is a sovereign state and that the plaintiff's claim arises out of a public act.

Meadows v. Dominican Republic, 817 F.2d 517, 522 (9th Cir.), *cert. denied*, 484 U.S. 976, 108 S.Ct. 486, 98 L.Ed.2d 485 (1987). While Wartsila does not claim immunity, and although the Union has not alleged that its claims are "based on a foreign state's strictly commercial acts," the burden is upon the foreign state to establish its status as a foreign sovereign and thus its right to the benefits of the FSIA.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-70433
DC #-89-0338-SPK

WILMINGTON TRUST COMPANY,

Petitioner,

and

INTERNATIONAL ORGANIZATION
OF MASTERS, MATES & PILOTS

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Respondent,

and

CONNECTICUT BANK &
TRUST COMPANY, *et al.*,

Real Parties
in Interest.

BEFORE: TANG and NOONAN, Circuit Judges,
and SHUBB,* District Judge.

ORDER

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

---

* Honorable William B. Shubb, United States District Judge for the Eastern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed November 4, 1991]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

IN ADMIRALTY

CIV. NO. 89-00338 SPK

THE CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, not in its individual capacity but solely as indenture trustee,

Plaintiff,

and

WILMINGTON TRUST COMPANY, Trustee on behalf of THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS; VSE CORPORATION; THEODAVIES MARINE AGENCIES, INC.; PACIFICO CREATIVE SERVICE INC.; THE MARITIME INSTITUTE OF TECHNOLOGY AND GRADUATE STUDIES; INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS and JOHN F. SOKOLOWSKI; HAWAII STEVEDORES, INC.; H.T.&T. CO., INC., MCCABE HAMILTON & RENNY CO., INC.; MATSON SERVICES, INC.; AMERICAN SHIP MANAGEMENT, INC., JAS W. GLOVER, LTD.; and THE LIHUE PLANTATION COMPANY, LIMITED dba KAUAI SUGAR STORAGE COMPANY,

Intervening Plaintiffs,

v.

The U.S.-Flag Vessel "Monterey", O.N. 264687, her engines, boilers, tackle, etc., *IN REM*, and S.S. MONTEREY PARTNERSHIP, *IN PERSONAM*,

Defendants,

S.S. MONTEREY LIMITED PARTNERSHIP,
and WILMINGTON TRUST COMPANY,
Trustee on behalf of THE INTERNATIONAL
ORGANIZATION OF MASTERS,
MATES & PILOTS,

Counterclaimants,

v.

THE CONNECTICUT BANK AND TRUST
COMPANY, NATIONAL ASSOCIATION,
not in its individual capacity but solely as indenture
trustee, and WARTSILA MARINE INDUSTRIES
INC. and OY WARTSILA AB,

Counterclaim
Defendants.

ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE JURY DEMAND

Claimant and Plaintiff in Intervention WILMINGTON TRUST COMPANY and Counterclaim Defendant INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS' Motion to Set Action for Jury Trial and Plaintiff/Counterclaim Defendant THE CONNECTICUT BANK AND TRUST COMPANY'S Motion to Strike Jury Demand came on for hearing on July 30, 1990 before the Honorable Samuel P. King. Nenad Krek, Esq., appeared on behalf of the Wilmington Trust Company and the International Organization of Masters, Mates & Pilots (collectively "MM&P"). Michael Jaffy [sic], Esq., Dean H. Robb, Esq., and Steven M. Egesdal, Esq., appeared on behalf of Plaintiff THE CONNECTICUT BANK AND TRUST COMPANY, N.A. ("Connecticut Bank").

The court has given due consideration to the arguments of counsel presented at the hearing and to the papers filed herein regarding the pending motions. For the reasons set forth in the memoranda of the Plaintiff Connecticut Bank, the Connecticut

Bank's Motion to Strike Jury Demand is hereby GRANTED, and the MM&P's Motion to Set Action for Jury Trial is hereby DENIED.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, July 30, 1990

[Entered July 31, 1990]

/s/ Samuel P. King
United States District Judge

UNITED STATES CODE TITLE 28
Judiciary And Judicial Procedure

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

APPENDIX D

Federal Rules of Civil Procedure (1991)
Rule 9. Pleading Special Matters

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

Federal Rules of Civil Procedure (1991)
Rule 38. Jury Trial of Right

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

* * * * *

(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

FILED
MAR 5 1992
OFFICE OF THE CLERK

No. 91-1282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, *ET AL.*,

Petitioners,

—versus—

WILMINGTON TRUST COMPANY, AND UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Can the election provided by Rule 9(h), Fed. R. Civ. P., to "the pleader of a claim" deprive another party of its constitutional right to a jury trial of a properly joined counterclaim cognizable "at law".

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Respondents Wilmington Trust Company (hereinafter "Wilmington Trust")[1] and the International Organization of Masters, Mates and Pilots (hereinafter "MM&P")[2] submit this brief in opposition to the petition for certiorari filed by Connecticut Bank and Trust Company, National Association (hereinafter "Connecticut Bank"). Connecticut Bank seeks review of an order of the United States Court of Appeals for the Ninth Circuit holding that the MM&P's constitutional right to a jury trial of its non-maritime counterclaims against Connecticut Bank, Wartsila Marine Industries, Inc. (hereinafter "Wartsila Marine"), and Oy Wartsila Ab (hereinafter "Oy Wartsila") may not be abridged by Connecticut Bank's election to have its separate claims tried "in admiralty".

STATEMENT OF THE CASE

Connecticut Bank brought this action against the S.S. Monterey and her owners on behalf of Wartsila Marine, a subsidiary of Oy Wartsila, to foreclose a preferred ship mortgage on the vessel. Following the

---

[1] Wilmington Trust Company is a wholly owned subsidiary of Wilmington Trust Corporation. All of the subsidiaries of Wilmington Trust Company are wholly owned.

[2] The MM&P is an unincorporated U.S. labor organization.

vessel's arrest, Wilmington Trust, as trustee for the MM&P, filed a claim pursuant to Supplemental Admiralty Rule C(6) to assert its interest in the vessel as mortgage holder. Thereafter, the MM&P filed a claim in its own name. In addition to the filing of the claims, Wilmington Trust and the MM&P answered Connecticut Bank's complaint, as required by the Supplemental Rules for Certain Admiralty and Maritime Claims, and asserted certain counterclaims against Connecticut Bank, Wartsila Marine and Oy Wartsila.[3] Following the filing of their claims, answer and counterclaims, Wilmington Trust and the MM&P filed a complaint in intervention as required by the Local Rules of Practice for the United States District Court for the District of Hawaii.

The MM&P's counterclaims stated claims for relief under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1984) ("RICO"), the Employees Retirement Income Security Act, 29 U.S.C. §§ 1140-1141 (1985) ("ERISA") and the common

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[3] By filing a claim, the claimant has the right to file an answer and defend on the merits. 7A J. Moore, *Moore's Federal Practice*, ¶ C.16 at 700.15 (2d ed. 1988). As claimants in an *in rem* proceeding, Wilmington Trust and the MM&P assumed the posture of defendants. *The Two Marys*, 12 Fed. 152 (S.D.N.Y. 1882) ("A 'claimant' in the admiralty practice ... is a person who assumes the position of a defendant and demands the redelivery to himself of the vessel arrested").

law of fraud and tortious interference with contract.[4] The counterclaims are based upon certain material misrepresentations by Oy Wartsila and Wartsila Marine that induced the MM&P to sell the vessel and take back a second mortgage on the vessel subordinate to the mortgage held by Wartsila Marine.

Connecticut Bank challenged the propriety of the assertion of the MM&P's claims in the District Court, and the District Court ruled that the MM&P's claims were properly joined. As an unreviewable interlocutory decision, that decision was not before the Ninth Circuit and is not now before the Court.

Although it was undisputed below that the MM&P's counterclaims, standing by themselves, carry the Seventh Amendment right to a jury trial, the District Court struck the MM&P's jury trial demand for "the reasons set forth in the memoranda of [Connecticut Bank]".

In its memoranda, Connecticut Bank argued that the MM&P's non-maritime claims were not triable to the

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[4] On May 17, 1991, following the Ninth Circuit's issuance of its writ of mandamus, the District Court dismissed the MM&P's ERISA, RICO and tortious interference counterclaims. As an interlocutory decision, the MM&P was not entitled to appeal the District Court's decision, and the Ninth Circuit has not, therefore, had an opportunity to review the dismissal of these claims.

The District Court denied Connecticut Bank's motion to dismiss the MM&P's common law fraud and equitable subordination counterclaims. Trial of these counterclaims is scheduled to commence on July 6, 1992.

jury because Connecticut Bank's claim to foreclose its ship mortgage is maritime. According to Connecticut Bank, when a plaintiff asserts a maritime claim as to which there is no right to trial by jury, Rule 9(h), Fed. R. Civ. P., prohibits a jury trial of all other claims in the action, regardless of another party's constitutional right to trial by jury.

On the MM&P's petition for a writ of mandamus, the Ninth Circuit rejected Connecticut Bank's argument and held that Rule 9(h) does not prohibit a jury trial of a non-maritime claim, otherwise triable to the jury as a matter of right, simply because another party's claim lies exclusively in admiralty or because another party has elected, pursuant to Rule 9(h), to treat one of its claims as a "maritime claim".

By decision dated November 4, 1991, the Ninth Circuit declined to rehear the matter *en banc*. As set forth below, the Ninth Circuit's decision is correct and does not merit further review.

SUMMARY OF ARGUMENT

Certiorari is sought on the grounds that the Ninth Circuit's decision "emasculates" a plaintiff's alleged "right" to a non-jury trial of a maritime claim, that it is based on a misinterpretation of this Court's decisions and that it is in conflict with the decisions of the Fifth Circuit. As set

forth below, none of Connecticut Bank's arguments holds water. The decision of the Ninth Circuit is not in conflict with the decision of another court of appeals, is mandated by the decisions of this Court, and does not interfere with any recognizable right belonging to Connecticut Bank. In short, the Ninth Circuit's decision does not merit review by this Court.

REASONS FOR DENYING THE PETITION

I.

THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH, IF NOT REQUIRED BY, THE CONSTITUTION, THE FEDERAL RULES AND CONTROLLING PRECEDENT.

(A) The Ninth Circuit's Decision Preserves The MM&P's Constitutional Right To A Jury Trial.

Following this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), the Ninth Circuit held that one party's election to proceed in admiralty without a jury on its claim does not deprive another party of a jury trial, as provided by the Constitution, or the Saving-to-Suitors Clause, 28 U.S.C. § 1333(1) (1966), on the latter's properly joined non-maritime claims.

Moreover, to the extent that the claims that are triable to the jury as a matter of right are "factually related" to a maritime claim, as to which there is no right to trial by jury, the Ninth Circuit's decision properly recognizes that under the Court's decision in *Beacon Theatres*, all of the factually related claims must be submitted to the jury.

In *Beacon Theatres*, the Court held that a party's enjoyment of the constitutional right to trial by jury does not turn on whether the party won the "race to the courthouse". 359 U.S. at 504. The Court there stated that "if [the defendant] would have been entitled to a jury trial in a suit against [the plaintiff] it cannot be deprived of that right merely because [the plaintiff] took advantage of the availability of declaratory relief to sue [the defendant] first". The Court admonished that "only under the most imperative circumstances ... can the right to a jury trial of legal issues be lost through prior determination" of other claims. 359 U.S. at 510-511.

Plainly, the Ninth Circuit's decision in this case, that a jury trial of legal claims is not lost when such claims are asserted in a civil action in which maritime claims have been interposed, preserves the MM&P's constitutional right to a jury trial, as required by *Beacon Theatres*.

(B) The MM&P's Counterclaims Are Not "In Admiralty".

Although Connecticut Bank argues that the MM&P's counterclaims are not triable to the jury as a matter of right because they are "in admiralty", the premise of its argument, that the MM&P's counterclaims are "in admiralty", is false. The MM&P's counterclaims, based on ERISA, RICO, tortious interference with contract and common law fraud, arise "at law" and do not involve the application of maritime law.

That the MM&P's counterclaims were asserted in a civil action in which another party has asserted maritime claims does not deprive the counterclaims of their "legal" character, nor the MM&P of its Seventh Amendment right to a jury trial. 9 Wright and Miller, *Federal Practice and Procedure*, Civil § 2315 at 76 & n.72 (1971); *Cf.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989), *quoting*, *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity").

Indeed, the Federal Rules expressly contemplate the assertion of maritime and non-maritime claims in one action, a joinder not possible prior to unification. Rule 18 expressly provides that:

> A party asserting a claim to relief as [a] ... counterclaim ... may join, either as independent or as alternate claims, as

> many claims, *legal*, equitable, or maritime, as the party has against an opposing party.

Fed. R. Civ. P., Rule 18(a) (emphasis added).

Given that the MM&P has brought its claims against Connecticut Bank "at law", the MM&P's claims against Connecticut Bank are triable to a jury as a matter of right. Indeed, the Federal Rules expressly preserve the MM&P's right to a jury trial of its claims. Thus, Rule 38(a) states:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

A leading commentator's analysis of the operation of the Federal Rules likewise supports the MM&P's demand for trial by jury as to those claims which the MM&P has brought "at law":

> Just as the merger of law and equity permits joinder of claims of each kind, with the legal claims tried to the jury and the equitable claims to the court, so too the merger of civil and admiralty procedure was intended to permit joinder in one suit of claims historically of a maritime nature with those formerly triable in a civil action. *Though the merger does not expand the right to jury trial of the maritime claim, it does not prevent jury trial of the non-maritime claim.*

9 Wright and Miller, *supra*, Civil § 2315 at 76, n. 72 (emphasis added).

Thus, contrary to Connecticut Bank's assertions, the MM&P's claims are not "in admiralty". Indeed, with

the Court's adoption of the unified Federal Rules in 1966, the "admiralty side of the Court" was abolished. Since the unification, there has been but "one form of action ... known as 'civil action'". Fed. R. Civ. P., Rule 2. The advisory committee notes to the Federal Rules explain the significance of this change:

> This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 Rules abolished the distinction between actions at law and suits in equity, *this change would abolish the distinction between civil actions and suits in admiralty*.

Fed. R. Civ. P. 1, advisory committee notes, at 18 (West 1991) (emphasis added).

The leading admiralty treatise is to the same effect:

> Until 1966, each Federal District Court had an admiralty "side" with a separate docket and rules of procedure peculiar to admiralty cases. In 1966, the separate "sides" were merged, the admiralty "suit" became a regular "civil action", and the Federal Rules of Civil Procedure were made generally applicable, with some special rules for certain cases heard under the "admiralty" jurisdictional grant.

Gilmore and Black, *The Law of Admiralty*, § 1-1 at 2 (1975).

Plainly, the references in Connecticut Bank's brief to this case being one "in admiralty" are mistaken. There

are no longer cases "in admiralty", as Gilmore and Black observe:

> It must steadily be borne in mind, however, that no case is any longer "in admiralty", in the older sense; the admiralty clause in Article III of the Constitution, and the successive statutory implementations, are *grounds for jurisdiction* in ordinary civil actions, with some modification in procedural treatment when these grounds are with warrant invoked.

Gilmore and Black, *supra*, § 1-9 at 20.

Given that the MM&P's claims arise at law, its claims are triable to the jury as a matter of right, as the Ninth Circuit held.

(C) The Ninth Circuit Has Not "Emasculated" Rule 9(h).

Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision does not emasculate Rule 9(h), Fed. R. Civ. P. The Ninth Circuit properly rejected Connecticut Bank's assertion that one party's Rule 9(h) election to proceed in admiralty on its claims attaches to non-maritime claims by other parties.

Rule 9(h) is claim specific. By the terms of the Rule, a party's Rule 9(h) designation applies solely to specifically identified claims within the party's pleading, not to the entire "civil action". Thus, Rule 9(h) provides in pertinent part:

> A pleading or count setting forth *a claim* for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying *the claim* as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Fed. R. Civ. P., Rule 9(h) (emphasis added).

Plainly, Rule 9(h) speaks in terms of a "claim", not an "action". Contrary to Connecticut Bank's assertion, Rule 9(h) does not operate to transform every claim in a civil action into a "maritime claim". By the terms of Rule 9(h), the consequences of a Rule 9(h) election attach only to those claims which the "pleader" has identified as "maritime claims" or which are cognizable solely in admiralty.

To be sure, a pleader may, under certain circumstances, invoke Rule 9(h) to preclude a jury trial of the claim set forth in his pleading. But Connecticut Bank's contention that such an election precludes a jury trial of all claims, including claims by other parties, confuses one party's election to have its claims tried in admiralty without a jury with another party's constitutional right to have its independent claims tried at law with a jury, a right that Rule 38 of the Federal Rules expressly preserves.

As the Ninth Circuit recognized in a prior decision, where such a conflict arises, one party's Rule 9(h) election to proceed in admiralty without a jury must give way to the other party's constitutional right to a jury trial. *Owens-Illinois*, *supra*, 698 F.2d at 972 & n.2. This is the rule in the Eighth Circuit as well. *See*, *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8th Cir. 1983) ("interest of preserving constitutional rights" necessitated jury trial of counterclaims for breach of contract and fraud notwithstanding plaintiff's Rule 9(h) election with respect to his *in rem* claim).

Thus, the issue here is not whether a pleader may make a Rule 9(h) election with respect to the claims set forth in its complaint, but whether the pleader may additionally elect to have the non-maritime claims set forth, not in its pleading, but in the pleadings of other parties, treated as "maritime claims" to thereby deny such parties of their constitutional right to trial by jury. Following this Court's decisions, the Ninth Circuit correctly held that a pleader may not.

(D) There Is No "Right" To A Non-Jury Trial Of A Maritime Claim.

Connecticut Bank's assertion that the Ninth Circuit's decision will permit any party to "nullify" another party's "right" to proceed in admiralty without a

jury trial is flawed. Its premise, that a party has a "right" to a non-jury trial of a maritime claim, is faulty. There is no right to a non-jury trial. The Court settled that issue long ago. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, *reh'g denied*, 375 U.S. 870 (1963); *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 510 ("the right to jury trial is a constitutional one ... no similar right protects trials by the Court"); *see also*, *Owens-Illinois, Inc. v. U.S. District Court for the Western District*, 698 F.2d 967, 972 (9th Cir. 1983) ("there is ... no absolute ban on trial [by jury in admiralty cases]").

Thus, while Connecticut Bank complains bitterly that the Ninth Circuit's decision "undermines", "emasculates" and "undercuts" what it perceives as a right to a non-jury trial, the fact is, no decision of the Court has found such a right.

By contrast, the Seventh Amendment to the Constitution guarantees to the MM&P the right to trial by jury of claims at law. 9 Wright and Miller, *supra*, Civil § 2317. Given that the MM&P has brought its claims against Connecticut Bank "at law", the MM&P's claims are triable to a jury as a matter of right.

(E) Petitioners Misapprehend The Issue Before The Court.

Plainly, Connecticut Bank misapprehends the issue in this case. Contrary to the assertion in Connecticut Bank's petition, the issue resolved by the Ninth Circuit is not whether there is a right to a jury trial in an "admiralty case", but whether the right to a jury trial of a claim at law is somehow lost when that claim is joined in a civil action in which "maritime claims" have been asserted.

It is undisputed that a maritime claim is not a "common law" claim for purposes of the Seventh Amendment. Because the MM&P's counterclaim is at law, however, the Ninth Circuit held that the MM&P has a constitutional right to a jury trial of that counterclaim. That decision is correct. Plainly, a maritime claimant's preference for a bench trial cannot "trump" a civil claimant's constitutional right to a jury trial.

Nowhere does Connecticut Bank explain why the MM&P should be denied a jury trial of its non-maritime counterclaims, counterclaims based upon ERISA, RICO, tortious interference with contract and common law fraud, because it was required and/or permitted by Rule 13 to assert those counterclaims in an action in which a maritime claim has been asserted by another party. Nothing in the Federal Rules requires a defendant to waive a jury trial of legal counterclaims because the civil

and admiralty rules were merged and now permit the assertion of maritime and non-maritime claims in one action.

To assert, as Connecticut Bank does, that there is no right to a jury trial "in admiralty" is to beg the question: are the MM&P's ERISA, RICO, tortious interference with contract and common law fraud counterclaims "in admiralty". The Ninth Circuit held that the MM&P, as the pleader of those claims, could elect, pursuant to Rule 9(h), to bring the claims "at law". Connecticut Bank offers no explanation as to why it believes the election provided by Rule 9(h) is not available to the "pleader" of a counterclaim, as to why the MM&P's counterclaim is not "at law", or as to why, if the merger of law and admiralty was not intended to affect a party's right to jury trial, Rule 9(h) should be construed as prohibiting jury trial of a civil claim that, prior to merger, would most certainly have been triable to the jury as a matter of right.

Indeed, Connecticut Bank concedes that if the MM&P's counterclaims were pleaded in a complaint in a separate action, the Seventh Amendment would entitle the MM&P to a jury trial. Surely, the MM&P 's constitutional rights are not defeated by the fact that the Federal Rules permit the MM&P to assert its claims in a civil action in which maritime claims have been interposed. Plainly, the constitutional right to trial by

jury does not depend upon whether a claim is asserted with other claims in one action, or separately.

Although Connecticut Bank complains that as a result of the Ninth Circuit's decision "nearly every maritime claim will be heard by a jury", it is clear that the Ninth Circuit's decision in this case will not require a jury trial of a maritime claim unless that claim is "factually related" to a non-maritime claim by another party as to which the Seventh Amendment guarantees the right to trial by jury. In that limited circumstance, and only in that limited circumstance, is a jury trial required. Moreover, even if certain courts were to "be confronted with a greater number of costly and time-consuming jury trials", as Connecticut Bank asserts, such "considerations are insufficient to overcome the clear command of the Seventh Amendment". *Granfinanciera, S.A. v. Nordberg, supra*, 492 U.S. at 63.

Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision does not "ignore long-standing admiralty rights and traditions", but recognizes a principle that the Court has recognized since *Beacon Theatres*, that a party's constitutional right to a jury trial is not lost simply because that party was permitted to assert, or was required to assert, a legal claim in an action involving equitable or maritime claims. Since *Beacon Theatres*, the Court has made it clear that a party's right to a jury trial is not conditioned upon the

party's winning the race to the courthouse. *Beacon Theatres, Inc. v. Westover*, *supra*, 359 U.S. at 504.

Although Connecticut Bank argues that "admiralty is unique", and that admiralty has recognized that "judges, rather than juries, are the best fact-finders of complicated" maritime matters, Connecticut Bank has not cited any case in which this Court, or any other for that matter, has held that the Constitution and the Federal Rules do not apply to maritime claims, or that they do not apply to "complicated cases". While admiralty may be "centuries old", the Federal Rules of Civil Procedure are fully applicable to cases involving maritime claims. *See, Farbwerke Hoeschst, A.G. v. M/V "Don Nicky"*, 589 F.2d 795, 797 (5th Cir. 1979) ("the District Court ... accepted plaintiffs' argument that defendants' defense ... doesn't go in admiralty. We disagree. The Federal Rules of Civil Procedure are fully applicable in admiralty cases"). Given that the Federal Rules expressly "preserve the right to jury trial inviolate", the Ninth Circuit properly held that the MM&P is entitled to a jury trial of its legal counterclaims.

(F) The Ninth Circuit Has Not Misinterpreted The Court's *Fitzgerald* Decision.

According to Connecticut Bank, the Ninth Circuit's reading of *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963), is incorrect. Connecticut Bank asserts that since the plaintiff in *Fitzgerald* demanded a jury trial of his Jones Act claim, the Jones Act claim was tried on the "civil side" of the Court, not on the admiralty side of the Court, and that, therefore, the Ninth Circuit's reliance on *Fitzgerald* is misplaced.

To be sure, a Jones Act claim tried to a jury is deemed to be a claim "at law", rather than a claim "in admiralty". Insofar as this case is concerned, however, this is a distinction without a difference. The maintenance and cure claim in *Fitzgerald* was "cognizable solely in admiralty", 934 F.2d at 1030. Notwithstanding this fact, the Court held in *Fitzgerald* that the plaintiff's admiralty claim could be tried to a jury. The Court rejected the argument advanced by the defendant in *Fitzgerald* that there was a "right" to a non-jury trial of a maritime claim. Thus, the proposition for which *Fitzgerald* is cited by the Ninth Circuit, that there is no "right" to a non-jury trial of a maritime claim, is plainly correct.

Indeed, nowhere does Connecticut Bank take issue with the fact that the Court in *Fitzgerald* permitted

a maintenance and cure claim, cognizable solely in admiralty, to be tried to a jury. Plainly, if there were a right to a non-jury trial of a maritime claim, the Court could not have permitted the maintenance and cure claim in *Fitzgerald* to be tried to the jury.

It is the Connecticut Bank, not the Ninth Circuit, that misreads *Fitzgerald*.

(G) The Ninth Circuit's Decision Is In Accord With Ninth Circuit Precedent.

Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision is fully consistent with, if not required by, its own prior decisions. *See*, *Owens-Illinois, Inc. v. U.S. District Court*, *supra*, 698 F.2d at 971-972 & n.2 (9th Cir. 1983) ("when admiralty claims are joined with civil claims and the issues cannot be segregated for separate trial, a jury trial if timely demanded is required").

Connecticut Bank's suggestion that the Ninth Circuit's decision is inconsistent with *McCrary v. Seatrain Lines, Inc.*, 469 F.2d 666, 668 (9th Cir. 1972) and *Emerson G.M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984) is mistaken. Although Connecticut Bank seizes on *obiter dicta* in those decisions, its attempt to manufacture a conflict between this case and prior decisions by the Ninth Circuit is disingenuous. *McCrary*

and *Emerson* hold that a Rule 9(h) designation by the pleader of a maritime claim precludes an opposing party from demanding a jury trial of the pleader's claim. Neither decision holds that a plaintiff's Rule 9(h) designation attaches to cross-claims, counterclaims, and third-party claims asserted by other litigants. Nor does either decision hold that a party is entitled to a non-jury trial of a maritime claim when the maritime claim is factually related to other claims triable to the jury as a matter of right.

Neither *McCrary* nor *Emerson* considered the issue before the Ninth Circuit in this case: whether Rule 9(h) may be invoked by one party to deny an opposing party a jury trial of the opposing party's claim against the former. Plainly, the Ninth Circuit's holding in this case, that a party's Rule 9(h) election attaches solely to the party's claims and does not abridge an opposing party's constitutional right to a jury trial of other properly joined claims, is not in conflict with *McCrary* or *Emerson*.

II.

THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS.

Nor is the Ninth Circuit's decision in conflict with the decision of any other Court of Appeals. Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision is not inconsistent with the Fifth Circuit's decision in *Harrison v. Flota Mercante Grancolombia, S.A.*, 577 F.2d 968, 986 (5th Cir. 1978). *Harrison* does not stand for the proposition that a plaintiff's Rule 9(h) election precludes a jury trial of all claims asserted by other parties, as Connecticut Bank asserts. In *Harrison*, the Fifth Circuit held that a fourth party defendant was not entitled to demand a jury trial of the "product liability and negligent failure to warn" claim stated directly against it in the plaintiff's amended complaint, where the plaintiff's amended complaint identified the claim as one "within admiralty and maritime jurisdiction pursuant to Rule 9(h)". 577 F.2d 973 & 985 (5th Cir. 1978).

Contrary to Connecticut Bank's assertion, the Fifth Circuit did not consider whether the fourth party defendant was entitled to a jury trial of arguably non-maritime third and fourth party claims for indemnity. Because the District Court found the fourth party defendant solely liable to the plaintiff, it dismissed the

indemnity claims against the fourth party defendant and, hence, the fourth party's demand for a jury trial of those claims was not an issue on appeal and the Fifth Circuit had no occasion to consider whether the plaintiff's Rule 9(h) election precluded a jury trial, not only of the claims stated in the plaintiff's amended complaint, but in the third and fourth party complaints as well.

Harrison holds that the pleader is the master of his pleading, but no more. The pleader may designate his claim a maritime claim to be tried in admiralty without a jury. He may not, however, by his characterization of his claim, preempt the legal claim of another party or another party's constitutional right to a jury trial.

The other Fifth Circuit decisions cited by Connecticut Bank are likewise inapposite. In *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983) and *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975), plaintiffs were forced to non-jury trials when they identified their claims as maritime claims. Unlike this case, however, the only claims asserted in *T.N.T. Marine* and *Romero* were maritime claims; no party there asserted a claim "at law", as the MM&P has here. These cases, therefore, hardly hold, as Connecticut Bank asserts, that a Rule 9(h) designation

by one party defeats another litigant's constitutional right to a jury trial of a claim at law.

In *Fisher v. Danos*, 671 F.2d 904 (5th Cir.), *cert. denied*, 459 U.S. 840 (1982), the Fifth Circuit held that a Rule 9(h) election to proceed non-jury was not waived by counsel's acquiescence in a pretrial order providing for a jury trial. Again, the only claim involved was a maritime claim. The decision does not hold that a plaintiff's Rule 9(h) designation defeats a defendant's Seventh Amendment right to a jury trial of a legal counterclaim, as Connecticut Bank mistakenly asserts.

In short, the Ninth Circuit's decision does not conflict with the decision of any other Court of Appeals and is based upon a fair reading of Rule 9(h) and the Court's *Fitzgerald* and *Beacon Theatres* decisions. A fair reading of Rule 9(h) is that the power to make the election provided by the Rule belongs to the "pleader" of the "claim" and that the election is claim specific, not action preemptive. Likewise, the Court has squarely held that there is no right to a non-jury trial in admiralty and that, where factually related issues are common to legal and non-legal claims, all claims must be submitted to the

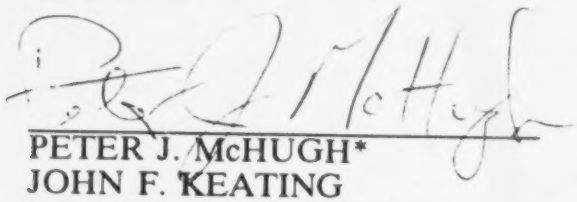
jury. Given that the Ninth Circuit's decision so holds, no further review is merited.

CONCLUSION

The day in which "proctors" filed "libels" on the "admiralty side" of the Court in accordance with the Admiralty Rules is no more. Since the merger of law and admiralty, the Federal Rules have permitted the assertion of maritime and non-maritime claims in one civil action, thereby providing the economies of a single court for disposition of complex modern disputes. Given that the Ninth Circuit's decision preserves the Seventh Amendment right to trial by jury after the merger, no further review is merited.

For the foregoing reasons, respondents respectfully submit that the petition for certiorari in Docket No. 91-1282 should be denied.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, *et al.*,

Petitioners,

vs.

WILMINGTON TRUST COMPANY, and UNITED STATES DISTRICT COURT FOR DISTRICT OF HAWAII, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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In The

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October Term, 1991

No. 92-1282

CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, *et al.*, *Petitioners*,

vs.

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an amicus curiae brief in support of the Petition for a Writ of Certiorari filed by Connecticut Bank and Trust Company, National Association, and Wartsila Marine Industries, Inc. ("Petitioners"). Petitioners have given consent to the MLA to file an amicus brief, but Respondents have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2.

NATURE OF APPLICANT'S INTEREST

I. THE MLA'S INTEREST LIES IN THE UNIFORM AND WORKABLE ADMINISTRATION OF MARITIME LAW.–

Applicant has a very strong interest in the disposition of this case, because it threatens to undermine traditions of admiralty practice which have been observed in this country since it was first

settled, and which have been recognized in the Constitution as well as statutes and rules of procedure enacted thereafter.

The MLA is a nationwide bar association founded in 1899, with a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests - shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters and other maritime claimants and defendants.

The purposes of the MLA, as stated in its Articles of Association, are to:

> . . . advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation . . . and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide range of legislation dealing with maritime matters during its ninety-one years of existence, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act[2]. The MLA has also

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[1] 46 U.S.C. §§ 1300-1315.

[2] 9 U.S.C. §§ 1-5.

cooperated with congressional committees in the formulation of other maritime legislation.[3]

The MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its commissions on trade law ("UNCITRAL") and trade and development ("UNCTAD"). The MLA works closely with the International Maritime Organization ("IMO"). The MLA has also participated actively, as one of some forty-nine national maritime law associations constituting the Comite Maritime International,[4] in the movement to achieve maximum international

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[3]E.g., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention For Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, reprinted in 6 M.M. Cohen, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), see 33 C.F.R. ch. 1, subch. D., Special Note at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[4]These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

uniformity in maritime law through the medium of international conventions.[5]

II. THE MLA PARTICIPATES AS AMICUS CURIAE ONLY WHEN THE OPERATION OF MARITIME LAW, PRACTICE OR TREATIES IS SERIOUSLY THREATENED.

In furtherance of its objectives, the MLA has filed amicus briefs in a number of cases, including briefs accepted by this Court.[6] For example, in Offshore Logistics, Inc. v. Tallentire[7], this Court agreed with the position advocated by the MLA and

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[5]E.g., Assistance and Salvage (1910), 37 Stat. 1658 (1913), reprinted in 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, reprinted in 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), reprinted in 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), reprinted in 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), reprinted in 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, reprinted in 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), reprinted in 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

[6]Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

[7]Id.

noted the MLA's role in relation to the matters at issue. The Court stated that:[8]

> The Maritime Law Association ("MLA"), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA (the Death on the High Seas Act). . . . the MLA, an expert body of maritime lawyers, had reason to fear that absent a savings clause [such as Section 7 of DOHSA], specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts.

However, it is the policy of the MLA to participate as amicus curiae only when important issues of maritime law or practice are involved, and only when the impact of the Court's decision may be substantial. The Bylaws of the MLA require that its participation as amicus curiae must be approved by the President, in consultation with the First and Second Vice-Presidents, and then submitted to the Executive Committee. The Bylaws provide that such approval must be given sparingly, and only when one or more of the following criteria are met:[9]

(a) The outcome of the litigation would adversely affect the uniformity of maritime law.

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[8] 477 U.S. at 223-224.

[9] Bylaws of the Maritime Law Association of the United States, Section 500-13.

(b) The outcome of the litigation would adversely affect traditional admiralty practice or procedure.

(c) The outcome of the litigation would adversely affect traditional admiralty jurisdiction.

(d) The outcome of the litigation would affect the meaning of a law or treaty advanced by the Association.

In the present case, the MLA is seeking to intervene because the Ninth Circuit's decision conflicts with the decisions of other circuit courts of appeal and threatens traditional admiralty practice as well as the uniform administration of maritime law.

III. THE NINTH CIRCUIT'S DECISION ADVERSELY AFFECTS TRADITIONAL ADMIRALTY PRACTICE AND THE UNIFORMITY OF MARITIME LAW.

In Merchant's National Bank of Mobile v. The Dredge Gen. G.L. Gillespie,[10] the Fifth Circuit recognized that admiralty is unique. It encompasses concepts and procedures which are separate from the common law. They date back as far as the middle ages and have evolved over the centuries to accommodate the needs of international trade.

Gillespie involved the question of whether the due process requirements of notice and hearing which had evolved in civil garnishment proceedings should apply in the same manner to admiralty actions in rem. The court recognized that:

> The Federal Courts have a great responsibility to speak consistently in maritime controversies because of their

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[10] 663 F.2d 1338, 1346-51 (5th Cir. 1980), cert. denied, 456 U.S. 966 (1982).

> recognized national and international significance. They must take care not to fashion rules and exceptions for a particular circumstance without assessing their impact in other situations. The rules and procedures in the maritime environment must apply equally to gigantic ocean-going oil tankers traveling from the Middle East to Japan and to small inland barges. . . 663 F.2d at 1347.

The federal courts have equal responsibility to speak consistently and uniformly with respect to non-jury trials in admiralty actions. The rules and procedures which they fashion must apply equally to vessels which travel between circuits and vessels which remain within the boundaries of a single circuit. The Ninth Circuit decision has breached the uniformity with which the federal courts have spoken regarding non-jury trials in admiralty actions, creating a conflict among the circuits. The Supreme Court must accept review of the Ninth Circuit's decision in order to remove the conflict.

Moreover, maritime law has been administered for literally hundreds of years according to the premise that actions in admiralty are tried to the court rather than a jury. Although the Saving to Suitors Clause in 28 U.S.C. § 1333 permits admiralty plaintiffs to sue on the law side of the court if the remedy sought is one which the common law is competent to give, the plaintiff has always had the election of bringing his action in admiralty for trial to the court. A great many actions are brought that way, resulting in a substantial savings of time and expense for litigants and courts alike. The Ninth Circuit's decision would erode the practice of non-jury trials in admiralty and the benefits derived therefrom.

Finally, like the court in Gillespie, this Court has often recognized the importance of uniformity in maritime matters.[11] Uniformity will become impossible to maintain if such uniquely maritime matters as ship arrests, salvage, general average, limitation of liability, collision and the carriage of goods become subject to the whim of jurors whose everyday experience provides no framework for dealing with such matters.

In order to preserve the uniform and effective administration of maritime law, this Court must vacate or reverse the decision of the Ninth Circuit.

THE MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

The MLA's perspective, arising from its interest in the fair and effective administration of maritime law in the United States, is necessarily different from that of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. The MLA can comment objectively about the need for review by this Court in order to preserve traditional admiralty practice and insure national uniformity on the issues presented. The MLA will concentrate only on the nature of admiralty

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[11] See, for example, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Moragne v. States Marine Lines, 398 U.S. 375 (1970); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Pope & Talbot v. Hawn, 346 U.S. 406 (1953); London Co. v. Industrial Commission, 279 U.S. 109 (1929); Union Fish Co. v. Erickson, 248 U.S. 308 (1919); Chelentis v. Luckenback S.S. Co., Inc., 247 U.S. 372, 382 (1918); Southern Pacific Co. v. Jensen, 244 U.S. 205, 216-17 (1916); and Lord v. Goodall, 102 U.S. 541 (1881).

practice, the manner in which the Ninth Circuit's decision conflicts with decisions by this Court and other circuit courts of appeals, and upon the detriment to admiralty practice which would result if the Ninth Circuit's decision is allowed to stand.

DATED February 26, 1992.

RESPECTFULLY SUBMITTED:

/s/ JEROME C. SCOWCROFT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-1282

CONNECTICUT BANK AND TRUST COMPANY NATIONAL ASSOCIATION, *et al.*,

Petitioners,

vs.

WILMINGTON TRUST COMPANY

and

UNITED STATES DISTRICT COURT FOR DISTRICT OF HAWAII, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as amicus curiae in support of the Petition for Certiorari by Connecticut Bank and Trust Company, National Association, and Wartsila Marine Industries, Inc. ("Petitioners").

QUESTION OF LAW PRESENTED

Whether a plaintiff's right to a non-jury trial under traditional admiralty practice, as preserved by Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure, can be nullified by a defendant or intervening claimant who joins non-admiralty claims and demands a jury trial of the entire action.

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this brief.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Federal Courts must speak uniformly and consistently in maritime matters, which have national and international significance. The rules and procedures in the maritime environment must apply in the same manner to vessels which operate nationally and internationally as to vessels which operate within the confines of a single circuit. The Ninth Circuit breached that uniformity and created a conflict among the circuits by holding that where a defendant or intervening claimant asserts a claim in an admiralty action which would be triable to a jury if brought separately, and demands a jury trial, the entire action must be tried to the jury despite the plaintiff's election to proceed under Rule 9(h) and have the action tried to the court. The Ninth Circuit's decision is erroneous as a matter of law, having been based upon faulty analysis and misinterpretation of prior decisions by the United States Supreme Court. It violates the time-honored practice of trying admiralty actions to the court rather than the jury, and disregards the mandate of Federal Rules of Civil Procedure 9(h) and 38(e) that

admiralty plaintiffs must be permitted to elect traditional admiralty procedures. If the Ninth Circuit's decision is allowed to stand, it will increase significantly the burden and expense to the parties and the courts of litigating admiralty actions. It will also undermine the uniformity of maritime law by subjecting such traditionally maritime matters as ship arrests, salvage, general average, limitation of liability, collision, and the carriage of goods to the whims of jurors who have no foundation in everyday experience for dealing with such matters. This Court must therefore accept review of the Ninth Circuit's decision in order to remove the conflict among the circuits and preserve the traditional maritime practice of trying admiralty actions to the court.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The Ninth Circuit held that when a defendant or intervening claimant asserts a claim in an admiralty action which would be triable to a jury if brought separately, and demands a jury trial, the entire action must be tried to the jury. None of the other circuit courts of appeals have gone so far. Several of them have held to the contrary.

A. The Fifth Circuit. - The Fifth Circuit Court of Appeals follows a very clear rule that there is no right to a jury trial in an admiralty action. The case most directly on point is Fisher v. Danos, 671 F.2d 904 (5th Cir. 1982), which held that it is reversible error to order a jury trial when the plaintiff has elected

to proceed in admiralty under Rule 9(h). In Fisher, a passenger in a skiff brought an action against the skiff owner and an oil company under Rule 9(h) for injuries received when the skiff struck the oil company's jetty. When the skiff owner was dismissed, leaving complete diversity of citizenship, the trial court granted the oil company's demand for a jury trial. The court of appeals reversed and remanded because the district court had violated the plaintiff's "right to a non-jury trial." 671 F.2d at 906.

Fisher v. Danos followed Harrison v. Flota Mercante Grancolombiana S.A., 577 F.2d 968 (5th Cir. 1978), in which a longshoreman injured by fumes from spilled cargo brought an action against the shipowner under Rule 9(h). The shipowner impleaded the longshoreman's employer, who filed a fourth-party complaint against the shipper of the cargo. The longshoreman amended his complaint to assert a claim against the shipper under Rule 9(h). The trial court entered judgment solely against the shipper, who contended on appeal that because the longshoreman's claims were cognizable in diversity as well as admiralty, the trial court had deprived it of a constitutional right by denying its demand for a jury trial. 577 F.2d at 985. The Fifth Circuit rejected the shipper's contention, holding that "by electing to proceed under 9(h) . . . the plaintiff may preclude the defendant from invoking the right to trial by jury which might otherwise exist." 577 F.2d at 986. See also Romero v. Bethleham Steel Corp., 515 F.2d 1249, 1253 (5th Cir. 1979); Durden v. Exxon Corp., 803 F.2d 845, 848-50 (5th Cir. 1986); and T.N.T. Marine Service, Inc. v. Weaver Shipyards and Drydock, Inc., 702 F.2d 585, 587 (5th Cir. 1983) (per curiam).

In summary, the Fifth Circuit follows a very clear rule that if the plaintiff designates the action as an admiralty action under Rule 9(h), or if the action is one which can only be brought in admiralty, it must be tried to the court. Intervening claims must also be tried to the court unless they are severed and supported by an independent basis for federal jurisdiction. Neither of those conditions have been met in the present case.

B. The Second, Third and Seventh Circuits. - Prior to the 1966 merger of the civil and admiralty rules, the Second, Third, and Seventh Circuit Courts of Appeals had held that a seaman's maintenance and cure claim could not be joined with a Jones Act claim and tried to a jury in an action at law. Instead, the maintenance and cure claim had to be brought in admiralty and tried to the court. Fitzgerald v. United States Lines Co., 306 F.2d 461, 468-474 (2d Cir. 1972); Jordine v. Walling, 185 F.2d 662, 666 n. 4, 671 (3d Cir. 1950); Mullen v. Fitz Simons & Connell Dredge and Dock Co., 191 F.2d 82, 85-86 (7th Cir. 1951). In Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963), the Supreme Court reversed that rule with respect to maintenance and cure claims which are sought to be joined with a Jones Act claim in an action at law. However, the Supreme Court's decision did not disturb the premise underlying the Second, Third and Seventh Circuit decisions that actions in admiralty were tried to the court rather than a jury. The Second Circuit has held on two subsequent occasions that even after the merger, admiralty actions remain distinct from civil actions and are subject to traditional rules of admiralty practice. See Penoro v. Rederi A/B Disa, 376 F.2d 125 (2d Cir. 1967), cert.

denied, 389 U.S. 852 (1968), and Tradax Ltd. v. Holendrecht, 550 F.2d 1337 (2d Cir. 1977), holding that the availability of interlocutory appeal from a stay pending arbitration is governed by the admiralty rule rather than the civil rule when the action is brought in admiralty. Accord, O'Donnell v. Latham, 525 F.2d 650 (5th Cir. 1976); J.M. Huber and Co. v. M/V Plym, 468 F.2d 166 (4th Cir. 1972).

C. The Eighth Circuit. - In Koch Fuels, Inc. v. Cargo of 13000 Barrels of No. 2 Oil, 705 F.2d 1038 (8th Cir. 1983) (rehearings and rehearing en banc denied May 27, 1983), the Eighth Circuit held that when the defendant in an admiralty action demands a jury trial for a counterclaim which would be triable to a jury if brought separately, the plaintiff's right to a non-jury trial should be protected by severing the counterclaim. Koch involved a Kansas shipper which brought an action in rem for possession of oil on a barge operated by a Missouri corporation and asserted an in personam claim against the barge operator under Rule 9(h) for conversion of the cargo. The barge operator asserted a counterclaim in diversity for breach of contract and demanded a jury trial. The shipper's in rem and in personam claims were tried to the court, but the counterclaim was severed for trial to a jury. The court of appeals affirmed on the ground, inter alia, that the trial court had preserved the plaintiff's right to a nonjury trial of its admiralty claim. 702 F.2d at 1042. The Ninth Circuit ruled in the present case that the intervening claims must be tried to a jury even if the plaintiffs are precluded from having their admiralty action

to the court, thereby depriving the plaintiffs of their right to a non-jury trial.

Thus, the Ninth Circuit's decision conflicts with other decisions in the Second, Third, Fifth, Seventh and Eighth Circuit Courts of Appeals.

II. THE NINTH CIRCUIT'S DECISION MISCONSTRUES PRIOR DECISIONS OF THE SUPREME COURT.

The Ninth Circuit based its decision on two lines of authority. The first line of authority consists of Fitzgerald v. United States Lines, supra, which held that when a seaman brings a negligence action at law under the Jones Act, and demands a jury trial, the seaman's maintenance and cure claim arising out of the same facts may be joined and tried to the same jury. The second line of authority consists of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), which involved the right to jury trial under the Seventh Amendment.

The Ninth Circuit construed Fitzgerald to permit a jury trial in an admiralty action when the action includes a civil claim which would be triable to a jury if brought separately. 934 F.2d at 1030. To be sure, the Fitzgerald opinion contains language which lends support to the Ninth Circuit's construction when taken out of context. The Court states at pp. 20-21 of Fitzgerald that there is no Constitutional or statutory provision which forbids jury trials in "admiralty cases", and when a maintenance and cure "claim" is joined with a Jones Act "claim" for which a jury trial is mandated by statute, then both "claims" must be submitted to the jury when they arise out of the same set of facts. The Ninth Circuit combined

the aforementioned reference to "admiralty cases" with the holdings in Beacon Theatres and Dairy Queen to conclude that permissive joinder of non-maritime claims in an admiralty action necessitates a jury trial of the entire action. The Ninth Circuit's decision is erroneous as a matter of law, because its underlying premises are completely wrong.

A. Fitzgerald Does Not Apply to Admiralty Actions. - Rule 9(h) has superseded the statement in Fitzgerald that nonjury trials are not required by statute in admiralty actions. Moreover, it is necessary to distinguish between admiralty claims and admiralty actions when considering the right of jury trial. An admiralty claim is one which supports admiralty jurisdiction, but may not have to be brought in an admiralty action if other grounds for jurisdiction are available. (Certain admiralty claims, such as claims in rem, can only be brought in admiralty actions.) An admiralty action is one in which admiralty claims, which may or may not be joined with civil claims, are tried on the admiralty side of the court under traditional admiralty procedures as preserved by Rules 9(h) and 38(e).

The Ninth Circuit construed Fitzgerald as holding "that the plaintiff had a right to have all claims tried to a jury on the admiralty side of the court." 934 F.2d at 1030. The Ninth Circuit's reading of Fitzgerald is completely incorrect. Fitzgerald was a pre-merger action on the law side of the court, not on the admiralty side.

Fitzgerald involved a claim under the Jones Act, which gave seamen a cause of action for negligence and permitted the seamen

to bring their negligence claims "at law, with the right of trial by jury." 46 U.S.C. § 688. However, the Jones Act did not give seamen a right of jury trial in an admiralty action. That point was made clear by the decision of the Supreme Court in Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924).

In Panama R.R. Co. v. Johnson, the Jones Act was claimed to be unconstitutional because it withdrew a subject matter, namely seamen's negligence claims, from admiralty jurisdiction as preserved in Article III of the Constitution. Implicit in the constitutional challenge was the notion that seamen's negligence claims were thereafter to be brought exclusively on the law side of the court. The Supreme Court could have resolved the constitutional challenge by simply holding that the action created by the Jones Act, with the right of jury trial, was to be brought in admiralty. However, the rule against jury trials in admiralty forbade such a facile solution. The Court held instead that Jones Act claims could be brought either in admiralty or on the law side of the court and would be tried to a jury only on the law side. The Court stated that:

> [T]he statute leaves the injured seaman free . . . to assert his right of action under [the Jones Act] on the admiralty side of the court. On that side the issue will be tried to the court, but if he sues on the common-law side there will be a right to trial by jury. So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning. 264 U.S. at 395 (emphasis added).

The Supreme Court repeated in several subsequent decisions that Jones Act claims must be tried to the court when brought in admiralty. See, for example, Panama R.R. v. Vasquez, 271 U.S. 557, 560 (1925), and Pacific Steamship Co. v. Petterson, 278 U.S. 130, 134-35 (1928).

Panama R.R. Co. v. Johnson was followed by Romero v. Int'l Terminal Op. Co., 358 U.S. 354 (1959), in which a seaman brought an action against his employer under the Jones Act and joined general maritime claims against other defendants. The seaman elected to proceed at law rather than in admiralty, and demanded a jury trial. Jurisdiction was invoked under the Jones Act and 28 U.S.C. § 1331, which creates subject matter jurisdiction for cases "arising under the. . . laws . . . of the United States." The Supreme Court held that since the claim against the employer was pled properly under the Jones Act, it supported "arising under" jurisdiction under 28 U.S.C. § 1331. The Court then held that the general maritime claims against the other defendants were not actions at law within the meaning of 28 U.S.C. § 1331. Since the seaman had refrained from pleading admiralty jurisdiction, and the maritime claims were not actions at law, the Court was required to consider whether there was some other basis for jurisdiction over those claims. The Court held that the district court could entertain the maritime claims pendent to its "arising under" jurisdiction over the Jones Act claim. The Court also held that since the Jones Act claim was supported by 28 U.S.C. § 1331, the citizenship of the employer did not have to be considered for purposes of diversity jurisdiction with respect to the maritime claims. Since diversity was

complete between the seaman and the maritime defendants, the maritime claims were also supported by 28 U.S.C. § 1332.

Thus, Romero held that when a seaman brings an action "at law" under the Jones Act and demands a jury trial, he is not proceeding in admiralty. Panama R.R. Co. v. Johnson and Romero were followed by McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), which held that the seaman's claims for unseaworthiness and negligence must be brought in the same proceeding.

The Fitzgerald Court was therefore confronted with a situation in which the seaman had exercised his statutory right to bring his Jones Act claim at law before a jury. The seaman was required under McAllister to join the maritime claim of unseaworthiness. The seaman also joined the maritime claim for maintenance and cure. The Supreme Court held in those limited circumstances that:

> [S]ince Congress in the Jones Act has declared that the negligence part of the claim shall be tried to a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone. . . . Accordingly, we hold that a maintenance and cure claim joined with the Jones Act claim must be submitted to the jury when both arise out of one set of facts. 374 U.S. at 21 (emphasis added).

It is clear from the foregoing that Fitzgerald does not apply to admiralty actions. It was a pre-merger action on the law side of the court. The Supreme Court had already established in Panama R.R. Co. v. Johnson, Panama R.R. Co. v. Vasquez, Pacific Steamship Co. v. Petterson, and Romero, supra, that admiralty actions are distinct from actions at law and must be tried to the

court even when they involve Jones Act claims. Moreover, it has been commonplace since the enactment of the Jones Act for negligence, unseaworthiness, and maintenance and cure claims to be brought in admiralty and tried to the court. When the Supreme Court stated in Fitzgerald that the Jones Act and maintenance and cure claims were required to be submitted to a jury, it was necessarily talking about actions at law rather than admiralty actions. This Court has never held that admiralty actions, as distinguished from admiralty claims in civil actions, can be tried to a jury. Since the present case involves an admiralty action, and not merely an admiralty claim, the holding in Fitzgerald is irrelevant.

B. The Intervening Claimants Are Not Entitled to a Jury Trial as a Matter of Right. - The Ninth Circuit assumed in the present case that the intervening claimants have a right to a jury trial under the Seventh Amendment. That assumption was based upon Beacon Theatres, Inc. v. Westover, supra, and Dairy Queen, Inc. v. Wood, supra, which held that when claims at law are joined with claims in equity in an action at law, the issues determinative of the claims at law must be tried to a jury. The Ninth Circuit's reliance on Beacon Theatres and Dairy Queen is misplaced. Those decisions were based upon the fact that the Seventh Amendment guarantees a jury trial in common law actions. Beacon Theatres, supra, 359 U.S. at 509-510. However, admiralty actions have never been recognized as common law actions. They have a completely separate history and jurisdictional basis under Article III, Section 2 of the Constitution and Title 28 of the United States Code.

Romero, supra. The Supreme Court held in Waring v. Clarke, 46 U.S. 441 (1847) that the Seventh Amendment does not apply to admiralty actions.

Waring v. Clarke involved a suit between the owners of vessels which collided in the Mississippi River upriver from New Orleans. The defendant challenged admiralty jurisdiction on the ground, inter alia, that it could not be exercised with respect to actions triable to a jury. The defendant contended that since the common law courts would have exercised jurisdiction over a tort on inland waters, and the Seventh Amendment guaranteed the right of jury trial in "suits at common law," the district court could not exercise admiralty jurisdiction. The Supreme Court could have sustained admiralty jurisdiction on the ground adopted by the Ninth Circuit in the present case, that claims triable to a jury at common law remain triable to a jury when brought in admiralty. However, as in Panama R.R. Co. v. Johnson, supra, the principle of trying admiralty cases to the court was too strong for such a facile solution, particularly since the drafters of the Seventh Amendment were well aware of that principle. The Supreme Court therefore held that the Seventh Amendment does not apply to actions in admiralty, even when they include claims within the concurrent jurisdiction of the common law. The Court stated that:

> There is no provision . . . from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the Constitution knew was the mode of trial of issue of fact in admiralty. We confess, then, we cannot see how they are to be embraced in the Seventh Amendment of the Constitution, providing that in

> suits at common law the trial by jury should be preserved. . . .
>
> Suits at common law are a distinct class, so recognized in the Constitution. . . cases in admiralty another class distinguishable. . . as well as to the system of laws determining them as the manner of trial. . . . 46 U.S. at 460.

See also The Sarah, 21 U.S. 391, 394 (1823), in which Chief Justice Marshall stated for the Court that "Although [common law and admiralty jurisdiction] are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals." The Court stated further in Waring v. Clarke that:

> [T]he ninth section of the Judiciary Act countenances all the conclusions which have been announced in this opinion. . . It declares that issues of fact in civil causes of admiralty and maritime jurisdiction shall not be tried by a jury, and makes so clear an assignment to the courts of jurisdiction in criminal, admiralty, and common law suits that the two last cannot be so confounded as to place both of them under the Seventh Amendment of the Constitution. . . . (emphasis added) 46 U.S. at 464.

The Supreme Court has held in other cases as well that the Seventh Amendment does not apply to admiralty actions. In Crowell v. Benson, 285 U.S. 22, 45 (1932), the Supreme Court held that a jury trial was not required when the district court conducted a de novo review of a compensation award under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950, because the action was in admiralty and the Seventh Amendment was therefore inapplicable. See also Parsons v. Bedford, 28 U.S. 433, 446-47 (1830).

When the Court decided Fitzgerald in 1963, it considered the question of jury trials not because of any requirement regarding jury trials in admiralty actions, but rather because the Jones Act had created an action outside of admiralty jurisdiction to which certain maritime claims had to be joined. The Court reiterated in Fitzgerald that:

> [T]he Seventh Amendment does not require jury trials in admiralty cases. . . . 374 U.S. at 20.

Thus, it has been understood since the framing of the Seventh Amendment and the Judiciary Act of 1789 that jury trials are not required in admiralty actions, regardless of whether they include claims within the concurrent jurisdiction of the common law.

III. ADMIRALTY ACTIONS HAVE TRADITIONALLY BEEN TRIED TO THE COURT WITHOUT A JURY.

The practice of non-jury trials is one of the most fundamental aspects of traditional admiralty practice. It is based upon the historical realization that judges, rather than juries, are best suited to decide such uniquely maritime matters as salvage, limitation of liability, collision, maritime liens and general average cases, which lay far outside the domain of the average juror. See, e.g., McCann v. Falgout Boat Co., 44 F.R.D. 34, 43 (S.D. Tex. 1968) (citing 2 Benedict, Admiralty, Section 224 (1940)).

When the Constitution was adopted, it preserved the historical separation between admiralty and the common law by creating a separate jurisdictional grant for admiralty actions. U.S. Const., Art. III, Sec. 2. As indicated in Waring v. Clarke, supra, the Judiciary Act of 1789, 1 Stat. 73, 77, preserved traditional admiralty practice by specifically excepting cases brought in

admiralty from the practice of jury trials. The practice of trying admiralty actions to the court has been observed from that time onward. See, generally, The Sarah, 21 U.S. 391, 394 (1823), in which Chief Justice Marshall wrote that "[i]n cases of admiralty and maritime jurisdiction, it has been settled that trial is to be by the Court (citing cases)." See also 9 Wright & Miller, Federal Practice and Procedure § 2315, at 76 (1971) ("If the plaintiff chooses to identify its claim as an admiralty claim under Rule 9(h) there will ordinarily be no jury trial."); 2 Moore's Federal Practice, Vol. 2A, ¶ 9.09 at 9-98 (1991) ("A defendant in a case brought within admiralty jurisdiction loses the right he would have had in an ordinary civil action at 'law' to demand a jury trial. . . .").

Congress has the power to make jury trials available in admiralty. However, the only time Congress has done so is when it passed the Great Lakes Act of 1845, Ch. 20, 5 Stat. 726. The Great Lakes Act was intended to extend admiralty jurisdiction to the Great Lakes and their connecting navigable waters. A principal objection to the Act was the absence of jury trials in admiralty actions. Congress met that objection by providing a right of jury trial in actions arising on the Great Lakes. 28 U.S.C. § 1873. In The Genesee Chief, 53 U.S. 443 (1851), the Supreme Court held that the purported extension of admiralty jurisdiction to the Great Lakes was a nullity, because such jurisdiction already existed under Article III of the Constitution and could not be altered by Congress. However, the provision for jury trial of actions arising on the Great Lakes has never been stricken from the U.S. Code. Texas Menhaden Co. v. Palermo, 329 F.2d 579, 580 (5th Cir. 1964).

That anomalous provision has been called a "discriminatory and illogical excrescence upon admiralty law." 50 Harv. L. Rev. 350.

There have been only two subsequent occasions on which Congress has considered permitting a jury trial in admiralty. In 1939 a bill was introduced to accomplish this, but the bill died in committee. House Committee on the Judiciary, H.R. 2723, 76th Cong., 1st Sess. See MLA Doc. 248 at 2601. In 1954, the Senate Committee on the Judiciary introduced a bill to expand the right of jury trial to all admiralty cases. The Department of Justice opposed the bill, and it was not enacted. S. Rep. 2351, 83rd Cong., 2d Sess. (1954).

When the Civil and Admiralty Rules were merged in 1966, the non-jury aspect of admiralty procedure was expressly preserved by means of Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure. Rule 9(h) provides that when a plaintiff brings an action which has some basis for subject matter jurisdiction in addition to admiralty, the plaintiff can designate the action as an admiralty action. Rule 38(e) provides that the Rules shall not be construed to require jury trials in actions so designated. The purpose of those rules was explained as follows by the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure:

> Certain distinctive features of the admiralty practice must be preserved. . . . One of the important procedural consequences is that. . . in the suit in admiralty there is no right to jury trial except as provided by statute (emphasis added).
>
> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right

> is not provided by statute.... The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not. Notes of Advisory Committee on Rules, 1966 Amendment, Federal Civil Judicial Procedure and Rules (West 1991 Rev. Ed., p. 34).

The Ninth Circuit's decision emasculates Rules 9(h) and 38(e), in derogation of the clear intention of the Advisory Committee, by taking away the right of the admiralty plaintiff to elect traditional admiralty procedures, including trial to the court.

IV. THE NINTH CIRCUIT'S DECISION WILL ERODE TRADITIONAL ADMIRALTY PRACTICE AND THE UNIFORM ADMINISTRATION OF MARITIME LAW.

The consequences of the Ninth Circuit's decision will be extremely detrimental for admiralty litigants and courts alike. If the plaintiff's Rule 9(h) election is rendered inoperative to preclude a jury trial, a great many admiralty cases now tried to the court will have to be tried to a jury. As a result, district courts, practitioners and parties will be confronted with many more costly and time-consuming trials.

For example, the maritime supplier's lien arose for the specific purpose of enabling the ship to function as a "floating credit card," so that necessary supplies can be obtained in locations where the shipowner has no presence. As a result, there are many lien foreclosures which meet the requirements of diversity jurisdiction. The Panel's decision would require such cases to be tried to a jury upon the demand of the defendant whenever an in rem claim is joined with an in personam claim arising out of the supply contract.

or whenever the defendant asserts a counterclaim which would be triable to a jury if brought separately.

Similarly, the very nature of maritime commerce necessitates that collision, salvage and general average cases are likely to involve diverse parties and counterclaims or intervening claims which would be cognizable at common law. Such claims are the very types of claims which for centuries have been regarded as more suitable for trial to the court than to a jury. Yet the Ninth Circuit's decision would require all such cases to be tried to a jury on the demand of a counterclaimant, cross-claimant or claimant in intervention. The consequences would be similar in actions such as mortgage foreclosures, which typically involve numerous intervening claimants. The Ninth Circuit's decision would require a jury trial upon the demand of any claimant who asserts a claim which would be triable to a jury if brought in a separate action.

The ultimate result of the Ninth Circuit's decision will be to erode the practice of non-jury trials in admiralty, against the best interests of the maritime industry and the courts, and contrary to the will of Congress and the Advisory Committee as expressed in the Judiciary Act of 1789 and Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure.

CONCLUSION

The Panel's decision is contrary to traditional admiralty practice as preserved in the Judiciary Act of 1789 as well as Rules 9(h) and 38(e) of the current Rules of Civil Procedure. It is also inconsistent with a substantial line of decisions by the United States Supreme Court and various circuit courts of appeal. In order to eliminate

a conflict among the circuits, preserve the traditional admiralty practice of non-jury trials, and protect uniformity in the administration of maritime law, this Court must vacate or reverse the Ninth Circuit's decision and rule that petitioners' admiralty action must be tried to the court. Respondents' intervening claims cannot be tried to a jury unless they are tried separately from petitioners' admiralty action.

DATED: February 25, 1992.

RESPECTFULLY SUBMITTED:

/s/ _____

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CERTIFICATE OF SERVICE

Pursuant to Rule 29 of the Rules of this Court, I hereby certify that three copies of the Motion by the Maritime Law Association of the United States to File Amicus Curiae Brief, and Brief in Support of a Petition for a Writ of Certiorari, were mailed by first-class mail, postage prepaid, this 4th day of March, 1992, to the following parties and counsel:

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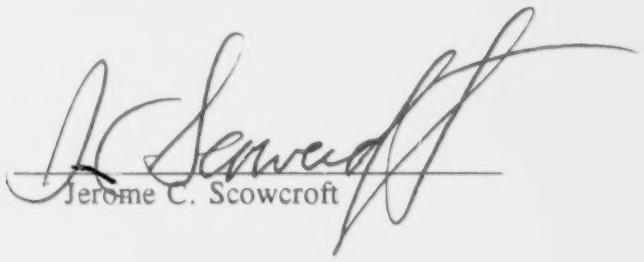

Jerome C. Scowcroft

APPENDIX

PETITIONER'S CONSENT TO PARTICIPATION OF MARITIME LAW ASSOCIATION AS *AMICUS CURIAE*

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February 28, 1992

VIA FASCIMILE

Jerome C. Scowcroft, Esquire
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Re: In the Supreme Court of the United States
October Term, 1991,
Connecticut Bank and Trust Company, National Association, et al., Petitioners, v. Wilmington Trust Company, and United States District Court for the District of Hawaii, et al., Respondents,
Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit,
Docket No. 91-1282

Dear Mr. Scowcroft:

As counsel for Petitioners in connection with the above-referenced Petition for Writ of Certiorari, we hereby consent to the filing of an amicus curiae brief in support of the Petition by the Maritime Law Association pursuant to Supreme Court Rule 37.2.

Very truly yours,

Michael Evan Jaffe
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Supreme Court, U.S.
FILED
MAR 25 1992
OFFICE OF THE CLERK

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IN THE

Supreme Court of the United States

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v.

Wilmington Trust Company,
and
United States District Court for the District of Hawaii, *et al.*

Respondents.

PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Pursuant to Rule 15.6 of the Rules of this Court, Petitioners Connecticut Bank and Trust Company, National Association, and Wartsila Marine Industries Inc. respectfully submit this brief in reply to Respondents Wilmington Trust Company and the International Organization of Masters, Mates & Pilots' brief in opposition to the Petition for Certiorari.

Respondents attempt three basic arguments in their brief in opposition: (1) the Ninth Circuit's decision has not emasculated Federal Rule of Civil Procedure 9(h); (2) the Ninth Circuit's decision upholds the International Organization of Masters, Mates and Pilots'[1] (the "Union's") constitutional right to a jury trial with respect to its claims at law; and (3) the Ninth Circuit's decision is not in conflict with the decisions of the United States

[1] Respondent Wilmington Trust Company has no claims at law.

Court of Appeals for the Fifth Circuit. Respondents are wrong on each point.

I. THE NINTH CIRCUIT'S DECISION EMASCULATES RULE 9(h).

Respondents argue that the Ninth Circuit's decision does not emasculate Rule 9(h) of the Federal Rules of Civil Procedure because it merely rejects the argument that an admiralty plaintiff by invoking Rule 9(h) can prevent another party from having a jury trial on its own claims at law properly joined in the admiralty action. But the Ninth Circuit's decision goes far beyond this proposition, and, in the context of the facts of this case, is startling in its reach. The Ninth Circuit's holding is:

> Therefore, we hold that Wartsila's election to proceed in admiralty does not deprive the Union of a jury trial on the Union's properly joined claims. We note that our holding may result in the entire case being tried before a jury. This result is likely to occur if all the claims are closely related factually. *See, e.g., Fitzgerald*, 374 U.S. at 21, 83 S.Ct. at 1650 (all claims must be submitted to jury when they "arise out of one set of facts.")

Wilmington Trust Company v. United States District Court for the District of Hawaii, 934 F.2d 1026, 1032 (9th Cir. 1991) (Appendix A at 13a). The Ninth Circuit's decision allows a party in an admiralty action not only to assert a jury trial right with respect to claims at law joined in the admiralty action, but also to defeat the plaintiff's election under Rule 9(h) where the claims at law are not involved in the admiralty case but the admiralty claims are "closely related factually" to the added at law claims. And that defeat comes under the Ninth Circuit's decision at the hands of the Union, which was not a part of the

admiralty case, on a claim against companies that also were not original parties to the admiralty action.[2]

The jury trial demand was made by the Union, a permissive intervenor. The Union is the only party asserting claims at law. The Union was not sued by any party nor did it have any admiralty claims. The district court, nonetheless, permitted the Union to intervene in the admiralty action and permitted it to assert its claims at law not against the admiralty plaintiff, Petitioner Connecticut Bank and Trust Company, National Association ("Connecticut Bank"), but against two Finnish corporations, Petitioner Wartsila Marine Industries Inc. and Oy Wartsila Ab. Neither was a party to the admiralty action, but had to be joined as defendants for the purposes of the permissive law claims only.[3] This is not a case where the defendant in an admiralty action files a compulsory counterclaim at law and demands a jury trial.

If the Union is able to defeat Connecticut Bank's Rule 9(h) election on these facts, then under the Ninth Circuit's decision, an admiralty plaintiff's election under Rule 9(h) can easily be nullified any time someone can inject itself into an admiralty action and assert "factually related" claims at law – even if the claims are not against the original admiralty plaintiff. It is difficult to imagine a case where an artful lawyer will not be able to plead "factually related" claims at law, obtain intervention and then defeat the plaintiff's Rule 9(h) election.

---

[2] Wartsila Marine Industries Inc. and Oy Wartsila Ab were not original parties to the admiralty action.

[3] Although the Union originally claimed federal question and diversity jurisdiction as the predicate for its claims at law, the district court dismissed all of its federal claims and found that there was no diversity of citizenship jurisdiction with respect to its remaining common law fraud claim. Nonetheless, the district court retained the Union's fraud claim, employing the dismissed federal claims as the basis for pendent claim jurisdiction.

Respondents incorrectly assert that this result is warranted because there is "no right to a non-jury trial of a maritime claim." Opposition at 12-13. Respondents' citation to this Court's decision in *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963), as support for this proposition is misplaced. In *Fitzgerald*, this Court permitted the plaintiff, an injured seaman, to join a maritime claim for maintenance and cure with a statutory Jones Act claim and to have both claims tried to a jury at law because they were factually related and the Jones Act granted a *statutory* jury trial right. While this Court permitted a maritime claim to be tried to a jury in that unique circumstance on the grounds of judicial economy, it did not hold in *Fitzgerald*, and has never held, that an admiralty plaintiff has no right to have its maritime claim tried to the bench by invoking Rule 9(h).

Moreover, Respondents' assertion plainly contravenes the unambiguous intent of the drafters of Rule 9(h) to preserve the right of an admiralty plaintiff to have its admiralty claims tried to the bench following the unification of the admiralty and civil rules of procedure. *See* Fed. R. Civ. P. 9 advisory committee's notes at 42-43 (West 1991). The advisory committee explicitly stated that it was its intent in drafting Rule 9(h) to

> [p]rovide some device for preserving the present *power* of the pleader to determine whether these historically maritime procedures [including a non-jury trial] shall be applicable to his claim or not . . . .

Id. (emphasis supplied).

The Ninth Circuit's decision threatens to make Rule 9(h) a nullity by allowing another party, even one having no admiralty claims, to defeat an admiralty plaintiff's Rule 9(h) rights by joining claims at law made soley against a party added to the admiralty case. Whatever the proper result, where a real conflict exists between an admiralty plaintiff's Rule 9(h) election and an admiralty defendant's constitutional right to a jury trial on at law

compulsory counterclaims, the Ninth Circuit's ruling in this case so overreaches that it, as a practical matter, reads Rule 9(h) out of the Federal Rules. Neither decisions of this Court nor the legislative history of the unification of the admiralty and civil rules supports such a result. Indeed, precisely the opposite was intended. In short, this case presents an important issue in the interplay of civil and admiralty jurisdiction and the extent to which Rule 9(h) in fact preserves the historically maritime procedures in cases with the admiralty jurisdiction of the district courts.

II. RESPONDENTS HAVE NO CONSTITUTIONAL RIGHT TO A JURY TRIAL IN THIS ADMIRALTY ACTION.

Respondents also assert that the Ninth Circuit's decision properly protects the Union's Seventh Amendment right to a jury trial on claims at law under the authority of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Contrary to Respondents' assertions, *Beacon Theatres* does not apply to admiralty actions, and therefore does not provide any constitutional right to jury trial for claims at law voluntarily joined in admiralty actions. In *Beacon Theatres*, this Court held only that when claims at law are joined with claims in equity *in an action at law*, the issues determinative of the claims at law must be tried first to a jury based on the Seventh Amendment's guaranty of a jury trial in common law actions. 359 U.S. at 509-10. This Court has never held that there is a constitutional right to jury trial for claims at law voluntarily joined in admiralty actions. Indeed, this Court has explicitly held that the Seventh Amendment does not apply to admiralty actions. *See Waring v. Clark*, 46 U.S. 441 (1847). And, there is no reason to stretch the Seventh Amendment guaranty to a situation where the joinder of the law claims is wholly permissive.

The Union's attempt to wrap itself in the mantle of the Seventh Amendment ignores the critical fact that it was the

Union which voluntarily chose to intervene and to assert its claims at law in the admiralty action. The Union is a permissive intervenor which filed permissive claims against two defendants who were added for the purposes of the law claims only. The Union was not a defendant who was forced to file compulsory counterclaims at law. The Union was free to file its claims in a separate action at law with the attendant right of a jury trial and without the fear of the application of *res judicata* or collateral estoppel, because neither the Union nor the defendants to the law claims – Wartsila Marine Industries Inc. and Oy Wartsila Ab – were parties to the admiralty action. By accepting the Union's argument that its claimed right to a jury trial must be preserved at all costs, the Ninth Circuit has not only emasculated Rule 9(h) but has also condoned a manipulation of the Federal Rules of Civil Procedure that runs counter to the declared intention of those who wrote Rule 9(h). *See*, Fed. R. Civ. P. 9 advisory committee notes at 42-43 (West 1991).

III. THE NINTH CIRCUIT'S DECISION CONTRADICTS THE DECISIONS OF THE FIFTH CIRCUIT.

Respondents erroneously argues that the Ninth Circuit's decision is not in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). Respondents attempt to distinguish *Harrison* by arguing that it only stands for the proposition that a plaintiff has the right by invoking Rule 9(h) to have its admiralty claim tried to the bench. Respondents argue that because the admiralty plaintiff in *Harrison* amended its complaint to state an admiralty claim under Rule 9(h) against the fourth party defendant, the Fifth Circuit never reached the issue of whether the fourth party defendant was entitled to a jury trial on the non-admiralty fourth party indemnity claim.

Respondents' technical point misses the plain language and the careful reasoning of the Fifth Circuit's holding in *Harrison*, which is directly in conflict with the Ninth Circuit's decision in *Wilmington Trust*. The Fifth Circuit specifically stated that it would not allow other parties to the action to emasculate the plaintiff's right to a non-jury trial under Rule 9(h). 577 F.2d at 986. The *Harrison* court also cited as support for its holding, among other cases, *Alaska Barite v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972), which squarely held that a defendant could not undermine the Rule 9(h) election by filing a permissive counterclaim at law. Id. Following Wilmington Trust, the district court's decision in *Alaska Barite* is no longer good law in the Ninth Circuit. Finally, the Fifth Circuit relied heavily on the advisory committees's notes to Rule 9(h) ignored by the Ninth Circuit: "One of the important procedural consequences is that in the civil action *either party* may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute . . . ." 577 F.2d at 985. In sum, it is clear that the Fifth Circuit held in *Harrison* that other parties cannot emasculate an admiralty plaintiff's right to a non-jury trial under Rule 9(h) simply by interposing a claim at law and demanding a jury trial.

The Ninth Circuit's decision in *Wilmington Trust* is inconsistent with the Fifth Circuit's decision in *Harrison*. This Court should grant the Petition for Writ of Certiorari to resolve this conflict between the circuits.

IV. CONCLUSION.

Because the Ninth Circuit's decision in *Wilmington Trust* emasculates well-established rights of admiralty plaintiffs and is in conflict with the Fifth Circuit's decision in *Harrison*, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted

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